Supreme Court, U.S.
FILED

09-841 JAN 4 - 2010

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No. _____

In The

Supreme Court of the United States

HOUSTON INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

VP, BY NEXT FRIEND JUAN AND SYLVIA P.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In cases construing the free appropriate public education requirement of the Individuals with Disabilities Education Act ("IDEA"), must courts disregard objective evidence of educational benefits received by a child, if those benefits are a result of teaching strategies not specifically enumerated in a child's individual education plan, or shall courts continue to rely on the standard enunciated in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) and include in the analysis longstanding indicia of educational benefit, including achievement of passing marks and advancement from grade to grade in the regular classrooms of a public school system?

2. When a parent obtains administrative relief under the IDEA requiring a private educational placement, does the local school system, or the state, bear the responsibility to pay for maintenance of that placement during the pendency of judicial proceedings under the Act?

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PETITION FOR A WRIT OF CERTIORARI

The Houston Independent School District ("HISD"), Plaintiff in the District Court and Appellee/ Cross-Appellant in the Court of Appeals, petitions for a writ of certiorari to review the judgment of the United State Court of Appeals for the Fifth Circuit in *Houston Independent School District v. V.P. b/n/f Juan and Sylvia P., 5th Circuit Docket No. 07-20817* (September 9, 2009).

OPINIONS BELOW

There are five (5) opinions below; culminating in the Court of Appeals ruling that is the subject of this Petition. In chronological order they are:

1. *Valencia P. b/n/f Mr. and Mrs. Juan P. vs. Houston Independent School District;* TEA Docket No. 405-SE-0804 — **Final Decision of the Hearing Officer dated February 10, 2005**

2. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.;* C.A. No. H-05-1686; In the United States District Court for the Southern District of Texas, Houston Division — **Magistrate's Memorandum and Recommendation dated March 2, 2007**

3. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.;* C.A. No. H-05-1686; In the United States District Court for the Southern District of Texas, Houston Division — **Magistrate's Memorandum and Recommendation dated September 11, 2007**

4. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.*; No. 07-20817 — **Opinion dated April 23, 2009, withdrawn September 9, 2009**

5. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.;* No. 07-20817 — **Opinion dated September 9, 2009** (Rehearing decision replacing original opinion dated April 23, 2009)

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its final decision on September 9, 2009, and denied rehearing and rehearing *en banc* on October 7, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AFFECTED

The Individuals with Disabilities Education Act, 20 United States Code, Section 1400 *et. seq.*

1. Section §1401(9) of Title 20 of the United States Code provides:

> **Free appropriate public education**
>
> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

2. Section 1414(d)(1)(A) of Title 20 of the United States Code provides in pertinent part:

Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

(I) a statement of the child's present levels of performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

* * * * *

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

* * * * *

(IV) a statement of the special education and related services and supplementary aids

and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

* * * * *

3. Section 1415(f)(3)(E) of Title 20 of the United States Code provides:

Decision of the hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

4. Section 1415(j) of Title 20 of the United States Code provides:

Maintenance of current educational placement

Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

Assistance to States for the Education of Children with Disabilities, 34 Code of Federal Regulations, Part 300 *et. seq.*

1. Section 300.101(a) of Title 34 of the Code of Federal Regulations provides in pertinent part:

Free appropriate public education (FAPE).

(a) General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and

21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).

* * * * *

(c) Children advancing from grade to grade.

(1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

* * * * *

2. Section 300.320 of Title 34 of the Code of Federal Regulations provides in pertinent part:

Definition of individualized education program.

(a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include—

(1) A statement of the child's present levels of academic achievement and functional performance, including—

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or

* * * * *

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability;

* * * * *

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

* * * * *

3. Section 300.513 of Title 34 of the Code of Federal Regulations provides in pertinent part:

Hearing decisions.

(a) Decision of hearing officer on the provision of FAPE.

(1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

* * * * *

4. Section 300.518 of Title 34 of the Code of Federal Regulations provides in pertinent part:

Child's status during proceedings.

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process hearing complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

* * * * *

> (d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

STATEMENT OF THE CASE

Factual Background

V.P. was a special education student in HISD with auditory and speech impairments. App. 2a. In spite of her disability, V.P. was in a regular education first grade classroom. App. 4a. Per the recommendations of an ARD Committee[1], she received numerous instructional modifications and services in the classroom. V.P. was instructed in and tested on the same State-mandated, first-grade curriculum as her non-disabled peers. App. 4a-5a, 21a-23a.

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[1] Under the Individuals with Disabilities Education Act ("IDEA"), special education students receive individualized instruction in accordance with an Individual Education Plan ("IEP") developed by a team comprised of school administrators, teachers, and the child's parents. *See* 20 U.S.C. §§1401(14), 1414(d). In Texas, the "IEP team" is referred to as the Admissions, Review, & Dismissal ("ARD") Committee. 19 TEX. ADMIN. CODE §89.1050; *see also Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert denied*, 522 U.S. 1047 (1998); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).

In addition to the classroom modifications required by her IEP, V.P.'s teacher implemented certain additional instructional modifications in her classroom to assist V.P. App. 20a. These additional modifications were relatively minor and did not change or reduce the State-mandated first grade curriculum.[2]

By the end of her first grade year, V.P. had successfully met the promotion standards established by HISD for all non-disabled students including passing grades in all classes, satisfactory performance on the standardized Stanford Achievement Test, and 100% mastery of the preset list of high frequency words. App. 22a-23a. V.P.'s standardized test scores also demonstrated significant academic gains. App. 23a. Although V.P. would continue to need modifications to accommodate her speech and hearing impairments, the ARD Committee recommended placement in a second grade regular education classroom for the 2004-2005 school year. App. 5a-6a.

V.P.'s parents had "expected more progress" and disagreed with the proposed program. App. 6a. Therefore, her parents unilaterally withdrew V.P. from HISD and enrolled her in a private school for children with language learning disabilities where she was placed, not in the second grade, but in a kindergarten/first-grade classroom with no opportunity to interact with non-disabled peers. *Id.*

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[2] V.P.'s teacher testified that she read the test instructions to V.P., pointed to pictures as appropriate, or gave her fewer test items.

Procedural Background

On August 20, 2004, V.P.'s parents filed a request for a "due process hearing" under the IDEA.[3] App. 7a. An evidentiary hearing was held in December 2004 and the hearing officer's decision was issued in February 2005. *Id.* The hearing officer concluded that V.P. had been denied a free appropriate public education ("FAPE") because the educational plan developed by HISD was not reasonably calculated to generate positive academic and nonacademic benefits. App. 7a-8a. HISD was ordered to reimburse V.P.'s parents for the 2004-2005 private school expenses. App. 8a.

This case was originally filed on May 10, 2005, as an appeal by HISD of the administrative hearing officer's decision that it had denied V.P. a FAPE under the IDEA. App. 8a; 20 U.S.C. §1415(i)(2)(permitting any party aggrieved by the findings and decision of the hearing officer to bring a civil action). V.P. filed an Answer and a Counterclaim in June 2005. App. 8a. Notably, she did not assert any claim for reimbursement with respect to any additional years of private school placement beyond the one ordered by the hearing officer. After HISD filed a Motion for Summary Judgment and V.P. responded, the Magistrate Judge issued recommendations on March 2, 2007, affirming the hearing officer's decision and awarding reimbursement of the private school costs associated with the 2004-2005 private school placement. App. 8a-9a.

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[3] *See* 20 U.S.C. §1415(f)(providing for right to impartial due process hearing).

The parties then filed cross-motions for summary judgment on the issue of reimbursement for V.P.'s continued placement at the private school during the 2005-2006 school year. App. 9a. V.P.'s parents had continued her placement in the private school without notice to HISD or the Court until a year after the case was on file and the next school year was over. App. 42a. The Magistrate recommended that V.P.'s request for pendency reimbursement for the 2005-2006 school year be denied because V.P. had failed to plead in the first instance or to seek to amend her pleadings to assert any right to reimbursement for the continued placement in the private school. App. 41a-42a. The District Court adopted both of the Magistrate's recommendations. App. 55a, 74a. V.P. appealed the Court's denial of the 2005-2006 tuition reimbursement. App. 9a. HISD cross-appealed the Court's finding that it had denied V.P. a FAPE under the IDEA. *Id.*

The Panel issued its initial opinion on April 23, 2009, affirming the District Court's decision that HISD had violated the IDEA, but reversing the District Court's refusal to award V.P. reimbursement for the 2005-2006 school year. Although the Panel denied HISD's first request for rehearing, it withdrew its first decision and issued a new opinion on September 9, 2009, reaching the same result. App. 1a-2a. The Court stated that V.P.'s passing grades and yearly advancement were not adequate measures of educational benefit because the improved grades and advancement resulted from modifications the regular education teacher implemented that were not included in her IEP. App. 25a. The Court stated that before passing grades and advancement can be seen as supporting a finding of educational benefit "those indicia must arise from compliance with and not

deviation from the IEP." App. 26a. With respect to the 2005-2006 reimbursement, the Court found that V.P. was excused from pleading for such relief because HISD was on notice of its legal obligation to maintain the placement at its expense throughout the pendency of the judicial proceedings. App. 50a. HISD filed a Second Petition for Rehearing which was denied on October 7, 2009. App. 160a-161a.

REASONS FOR GRANTING THE PETITION

It has been nearly thirty years since the Supreme Court issued its only opinion analyzing the substantive standard to be applied in determining whether a disabled child has received the "free appropriate public education" mandated by the IDEA. *See Bd. Of Educ. v. Rowley*, 458 U.S. 176 (1982). The court held that the IDEA does not guarantee maximization of the educational potential of disabled children. Moreover, in recognition of the Act's stated preference for mainstreaming, the court emphasized that the normal criteria for assessing positive educational benefit in regular education (*i.e.*, passing grades, test scores) are extremely important in determining whether disabled children in the mainstream are receiving a FAPE. The Fifth Circuit's holding in this case is in direct conflict with *Rowley,* as it holds that these classic indicia of progress in the mainstream must be "legally rejected" when they result from services provided to the child that are not specifically described in the student's IEP.

Neither *Rowley* nor the IDEA require that all instructional strategies employed in regular education classrooms be specifically identified in the IEP. Thousands of school districts that have relied for years on the *Rowley* standard to measure their own

compliance with the IDEA are now in a quandary concerning the extent to which good teaching practices must now be meticulously spelled out in the IEP lest they be judged to be immaterial in the determination of whether a special education student is receiving a FAPE. Sound educational policy and common sense mandate that the law give effect to all efforts of schools to educate disabled children, whether they are enumerated in the child's IEP, or merely the product of a regular education teacher's skill.

The Fifth Circuit's opinion is causing unnecessary confusion for educators dealing with the complexities associated with educating children with disabilities. Do educators now spend their precious time crafting lengthy IEPs that specify everything a regular education teacher may do in the classroom to ensure that students make satisfactory educational progress, or do they omit those details and risk that a court will find they have violated the IDEA even though the disabled child is receiving a positive educational benefit overall? Placing this burden on the scant resources available to public education systems at a time when their budgets are especially strained is simply wrong, and it is not justified by the IDEA, the court's holding in *Rowley*, or the educational needs of children with disabilities. In light of the vast amount of public dollars involved, and the impact this decision has on the education of our neediest children, this court's guidance is sorely required.

The maintenance of placement provision of the IDEA requires public funding of private school placements ordered by administrative hearing officers during the pendency of judicial proceedings under the Act. The IDEA regulations place this obligation on the

state, not the local school district. The Fifth Circuit's decision imposing this obligation on HISD is contrary to the regulation, and was premised on a fundamental misunderstanding of the reasons for shifting this burden to the state in the first place. According to the regulations, a private placement ordered by a hearing officer must be treated as an "agreement" between the state and the parents for purposes of maintaining the placement. Characterizing the local school system as having agreed to this placement, while it was appealing and arguing that the hearing officer's decision was incorrect, is nonsensical. Compounding its error, the Fifth Circuit reached this conclusion despite the fact that the claim for maintenance of placement reimbursement was never pled by the student's parents in the District Court and was rejected by the District Court for this very reason. By excusing the parents' failure to affirmatively seek the relief, HISD was effectively deprived of the opportunity to set forth the reasons why the state should have been held responsible for maintaining the placement, as opposed to HISD. This also poses a question of national importance, as the cost of private educational placements is substantial compared to the cost of public education. Placing this burden on the local school system further stretches the education dollar, and dilutes the financial ability of the school system to serve disabled children in its jurisdiction.

I. *Rowley*

Because of the IDEA's stated preference for mainstreaming, the vast majority of special education students in this country receive all, or a majority, of their education in regular classrooms. *See* 20 U.S.C. §1412(a)(5). Ensuring that each child receives an

educational benefit in the regular education classroom requires educators who are skilled, creative and responsive to individual needs. The efforts these teachers expend necessarily go beyond the four corners of a child's IEP. The IDEA does not purport to usurp the traditional role of the regular education teacher and it does not prohibit teachers from enhancing or supplementing a student's educational experience. *See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 703 (10th Cir. 1998)(citing appendix to previous version of IDEA for conclusion that IEP is not intended to be a detailed instructional plan).

The IDEA ensures that each child with a disability has available to them a "free appropriate public education" or "FAPE." 20 U.S.C. §1400(d), §1411(a). For each child with a disability the local school district must convene a group of persons knowledgeable about the student's needs to develop an individualized education plan ("IEP"). 20 U.S.C. §1414(d)(1). Under the IDEA's procedures, the IEP must include, among other things, statements regarding the child's present levels of performance, statements regarding the goals designed to enable the child to be involved in and make progress in the general education curriculum, and a statement of the program modifications that will be provided to the child to enable him or her to meet the goals. 20 U.S.C. §1414(d)(1)(A)(i)(I, II, and IV). Although the IEP must specify the special education services the child will receive and modifications to the regular education environment, it is not as detailed as a daily "lesson plan" and is not intended to tell teachers how to teach. *See O'Toole*, 144 F.3d at 703.

In *Rowley*, the court held that the free appropriate public education ("FAPE") to which a student is

entitled to under the Act, is a "basic floor of opportunity" which consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the child. *Bd. of Ed. v. Rowley*, 458 U.S. 176, 201 (1982).[4] In determining the adequacy of the educational benefit conferred upon students with disabilities, the Court explained that where a child is "mainstreamed" in a regular education classroom with his/her non-disabled peers, the public school system monitors the educational progress of the child. *Id.* at 202-03. In that setting:

> [r]egular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.

Id. at 203. Significantly, the IEP for the student in *Rowley* did not prescribe the teaching strategies to be employed by the regular education teacher to deliver the content of the course curriculum. Rather, it merely set forth the things that were required *in addition to* those ordinary strategies. *Rowley*, 458 U.S. at 184.

The court in *Rowley* noted that the IDEA's definition of a free appropriate public education requires, *inter alia*, an "appropriate ... elementary ...

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[4] The IDEA was previously known as the Education of the Handicapped Act. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982).

school education in the State involved," and services provided to the student "*in conformity with* the individualized education program." *Rowley*, 458 U.S. at 188 (emphasis added). The court ultimately found that the child's "academic progress, when considered *with* the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive." *Rowley*, 458 U.S. at 203, n.25 (emphasis added). Despite numerous amendments to the IDEA, *Rowley* remains the seminal case interpreting the educational benefit standard. *See e.g.*, *J.L. v. Mercer Island Sch. Dist.*, 575 F.3d 1025, 1027 (10th Cir. 2009)(concluding most recent amendments to IDEA did not alter *Rowley's* standard).

It is readily apparent that the IEP for the student in *Rowley* did not describe all of the services the student received that were provided as part of her "appropriate elementary education." The requirement that services be provided "in conformity with the IEP" does not mandate a detailed prescription of all teaching strategies that will be employed by a regular education teacher for children placed in regular education classrooms. Rather, it is plainly sufficient that the IEP simply indicate that the child will receive instruction in a given subject in a regular education classroom, and then go on to describe any supportive services that are necessary based on the student's disability to access the curriculum in that classroom. It would be needlessly redundant for the IEP team to describe the components of appropriate regular education instruction provided to all children, as it is plain that any child placed in the classroom will receive those things.

The Fifth Circuit ignored *Rowley* when it stated that "[a]s a legal matter, we find that [passing grades and advancement from year to year] should be rejected [as indicia of educational benefit] when it is found to be the product of unapproved deviations from the IEP." App. 26a. Notably, the court did not find that the services in question were proscribed by the IEP. The court offered no justification for its rejection of the undisputed evidence that V.P. benefited from these "unapproved" services, other than its reference to the fact that they were not described in her IEP. As these services enabled V.P. to obtain an adequate knowledge of the course material, they are entitled to be acknowledged through the grading and advancement system that this court identified as an important factor in determining educational benefit.

The IDEA merely requires that the services be provided to the child "in conformity with" the IEP, not that they be specifically enumerated therein. As was pointed out above, by placing a child in a regular education classroom, the IEP team is specifically approving the use of "best practice" regular education teaching methods for the student. As such, all of the services V.P. received were provided "in conformity with" her IEP, even though they were not specifically described therein. The Fifth Circuit's use of the phrase "unapproved deviations" is misleading as it suggests that the teacher was not following the IEP. To the contrary, supplementing the IEP services is not synonymous with failing to provide the services prescribed therein.

As previously noted, V.P. was instructed and tested on the same grade-level curriculum as her non-disabled peers and she passed every class, albeit with

the modifications. V.P. was responsible for learning the same State-mandated regular education first-grade curriculum as every other student in her class. V.P.'s teacher determined that measuring her progress in that curriculum required modifications, some of which were enumerated in her IEP and some which were not. Simply because her disability prohibits her from accessing that curriculum in the same manner as non-disabled students; *i.e.*, without modifications, does not render her passing grades meaningless.

The benefit V.P. received from the education provided to her exceeds the *Rowley* standard. In addition to her passing grades, V.P.'s standardized test scores, including the achievement test scores, are undisputed, reliable evidence of her educational benefit. Her scores on the Stanford and Woodcock Johnson Tests of Achievement demonstrate conclusively that she was making appropriate educational progress.[5] Although V.P. received accommodations to ensure she could hear the test proctor, these "standardized" tests were not otherwise modified *in any respect* for V.P. *See* App. 112a (noting modifications for standardized testing were approved by IEP). There is no justification for rejecting these results based on anything the teacher did in the classroom, as classroom modifications had no impact whatsoever on V.P.'s scores on these tests. V.P.'s successful performance on the standardized tests is

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[5] The Fifth Circuit acknowledged that HISD had pointed to objective evidence indicating that V.P. was receiving an educational benefit in her placement. The evidence established that V.P. had made nearly 3 years of progress in the 3 years she had been in HISD and that she was performing at or near the first grade level in most areas early in her first grade year. App. 23a.

solely the result of the fact that she was benefiting significantly from her education.

As this Court recognized in *Rowley*, the primary purpose of the IDEA is to ensure that children with disabilities receive an educational benefit. The Fifth Circuit's ruling elevates form over substance and holds that procedural compliance with IEP is paramount to the actual educational benefit a child receives. This is inconsistent with the IDEA and *Rowley*. Even if the educational benefit a child receives is a direct result of the unapproved modifications, it is still educational benefit. The school system that ensures a child receives an educational benefit in spite of a "procedurally deficient" IEP should be rewarded, not censured.

There is no valid reason to reject evidence of progress that results from educationally sound practices. There is no evidence to suggest that the teacher simply gave V.P. the correct answers or that her grades are an inadequate or unreliable indicator of educational benefit. Educators employ a variety of strategies and techniques in their classrooms that were never intended to be subsumed by the IEP process. Teachers everywhere are encouraged to provide "differentiated instruction" which involves alterations (modifications) to the way the class is taught to meet the needs of a diverse group of learners, disabled and non-disabled alike. *See e.g.*, *Ashli v. State of Hawaii*, Civ. No. 05-00429 HG-KSC, 2007 U.S. Dist. LEXIS 4927 *13-14, 31 (D.C. Hawaii Jan. 23, 2007) (recognizing teachers must have the flexibility to provide differentiated instruction to all students as needed in general education classrooms which can include reading test directions and providing

additional explanation on difficult lessons). The IEP was never intended to specify how general education teachers are to teach the general education curriculum. That is what good teaching is all about.

Under *Rowley,* HISD was not required to maximize V.P.'s educational potential. The fact that she cannot access the regular education curriculum in the same manner as her non-disabled peers, *i.e.*, without modifications, or that she will continue to need modifications in the future, does not establish a denial of FAPE. The Panel discounts the fact that V.P. met the same promotion standards applicable to non-disabled children because she had not "mastered" the first grade curriculum and would not have achieved passing grades without "modifications." However, *Rowley* made it abundantly clear that mastery of the curriculum is not required. Special education students frequently need "modifications," even when they are being educated in general education classrooms, to accommodate their disabilities. Some common modifications include shortened assignments, extended time for assignment completion, preferential seating, etc. These modifications do not dilute the curriculum, they merely facilitate a disabled child's access to it. V.P., who is a hearing impaired student like Amy Rowley, will likely always need modifications due to the nature and severity of her disabilities.

II. Procedural Violations under IDEA 2004

As previously noted, the IDEA requires that a student's IEP contain certain statements related to the child's performance, goals and program modifications. Thus, at worst, the failure of an IEP to contain all required modifications may constitute a "procedural

violation" of the IDEA. When the IDEA was amended in 2004, Congress stated, consistent with the existing case law, that procedural violations of the IDEA may result in a finding that the child did not receive a FAPE only if the hearing officer also finds that the procedural inadequacy:

> (1) impeded the child's right to a free appropriate public education;
> (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
> (3) caused a deprivation of educational benefits.

20 U.S.C. §1415(f)(3)(E)(ii). In situations where the school district commits a procedural violation of the IDEA, but the violation does not rise to the level of a denial of FAPE, hearing officers have authority to order the school district to comply with the procedural requirements. 20 U.S.C. §1415(f)(3)(E)(iii).

Other Circuits have recognized that the failure of the written IEP to contain all necessary statements is merely a procedural issue that does not necessarily deny FAPE. *See Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 611-13 (6th Cir. 2006)(finding failure of IEP to include statements regarding student's present levels of performance was a procedural violation that did not cause any substantive harm). The upshot of the Fifth Circuit's holding in this case is that the failure of the IEP to contain all required modifications is a *per se* denial of FAPE, as all evidence of positive benefit derived from modifications not described in the IEP is

to be legally rejected. This holding ignores Congress' admonition in the IDEA amendments. According to the statute, procedural deficiencies in the IEP (such as the failure to describe all required services) do not deny FAPE unless the child suffers some educational harm as a result. The appropriate response to procedural violations is not to reject all evidence of educational benefit, but rather to consider whether or not the failure to ensure procedural compliance harmed the student. *See* 20 U.S.C. §1415(f)(3)(E)(ii).

Clearly, the "unapproved" modifications at issue here did not harm V.P. or impact her parents' participation in the IEP process. To the contrary, the modifications permitted her to access the grade-level curriculum and receive an educational benefit as required by the substantive provisions of the IDEA. The "unapproved" modifications at issue here fall precisely within the scope of this regulation and are not inconsistent with the IDEA.

III. Liability for Pendency Placement

The IDEA provides that during the pendency of an administrative or judicial proceeding under the IDEA, the child shall remain in his/her "current educational placement" unless the parents and State or local educational agency agree otherwise. 20 U.S.C. §1415(j). The Department of Education has clarified that if an administrative hearing officer agrees with the child's parents that a change of placement is appropriate, the hearing officer's ruling must be treated as an agreement "between the State and the parents" for purposes of determining the "current educational placement." 34 C.F.R. §300.518(d). In this case, the hearing officer's ruling that V.P.'s parents

were justified in enrolling her in the private school created a right to pendency placement at the private school during the pendency of any appeals.

It is undisputed that V.P. did not raise any issue regarding pendency placement until June 9, 2006, when she asked the Court to admit as "additional evidence," the 2005-2006 private school bills in a motion titled "Defendant's Motion to Submit Additional Evidence." App. 8a. As the Fifth Circuit acknowledged, that motion was not filed until a year after her answer and counterclaim, and about a month after the school year in question had been over. App. 42a. At a hearing in August 2006 to consider V.P.'s motion to submit additional evidence, the Magistrate ruled that the 2005-2006 private school bills were not admissible because they were not related to the only issue before her, *i.e.*, the appropriateness of the hearing officer's decision. *See* App 40a, 63a.

The Magistrate Judge ruled that V.P. had failed to timely put HISD on notice of a claim for reimbursement of the 2005-2006 expenses. App. 71a. The Federal Rules require a party to make a "short and plain statement of the claim showing that the pleader is entitled to relief, and ... a demand for judgment for the relief the pleader seeks." FED. R. CIV. P. 8(a)(2). It is undisputed that V.P. failed to do this. Accordingly, the Magistrate refused to exercise her discretion to award the 2005-2006 expenses as "appropriate relief" under the IDEA. App. 71a. As stated by the Magistrate, "[t]he discretion of the court is broad, but not limitless. It does not grant the court the power to ignore the Federal Rules of Civil Procedure. The court will not impute notice on Plaintiff when Defendant has not followed the

pleading guidelines." *Id.* The Fifth Circuit reversed, finding that the Magistrate judge abused her discretion by refusing to excuse V.P.'s failure to properly plead her claim for "pendency placement" relief because the IDEA statute itself put HISD "on notice of a legal obligation." App. 50a.

HISD's Legal Obligation

The Fifth Circuit panel found that 34 C.F.R. §300.518(d) creates an absolute obligation *the school district* cannot avoid. As such, according to the opinion, HISD was on notice of its legal obligation. However, that regulation was changed, effective October 16, 2006, to clarify that only the state educational agency can be held responsible under the IDEA for maintaining the pendency placement. *See* 34 C.F.R. §300.518(d) (deleting reference to "or local educational agency"). Notably, a comment to the new regulation indicates that the change in the regulation was made so that it conformed with the longstanding judicial interpretation of the Act's pendency provision that a hearing officer's decision is favor of the parent constitutes an agreement "by the State agency and the parent" for purposes of determining the child's stay-put placement. 71 Fed. Reg. 46710 (Aug. 14, 2006) (recognizing hearing officer decision in favor of parent "is an agreement between the parent and the State, not the local education agency"). The effect of this change is the recognition that the local agency (the school district) does not have the obligation to fund pendency placements.

Had V.P.'s counsel timely asserted a claim for pendency reimbursement, HISD would have responded that it was not responsible and that V.P. needed to

bring the State of Texas into the lawsuit for purposes of recovering the stay-put expenses. The Court's holding that the magistrate abused her discretion is based on the flawed premise that HISD knew it would be liable for the expenses if a claim was timely asserted.

It is one thing to say that HISD was on notice that a claim could be made against it, it is quite another to say that HISD had "notice of a legal obligation." *See* App. 50a. V.P.'s parents never informed HISD that she would continue to attend the private school placement and certainly did not indicate she would seek reimbursement for that placement. Yet, the Panel's ultimate conclusion is based on the fact that by "operation of the precedents and federal regulations, HISD had notice of a legal obligation." *Id.* As was pointed out above, HISD was on no such notice as it believed, and believes, that the legal obligation belonged to the State of Texas, not HISD, to maintain the pendency placement.

CONCLUSION

Under *Rowley*, passing grades and advancement from grade-to-grade are objective indicia of educational benefit when a student is educated in the regular education classroom. The Fifth Circuit erred in rejecting all evidence of educational benefit resulting from educational services not described in the IEP. Its holding raises an important question of federal law which should be considered by this court. The Fifth Circuit also erred in holding HISD responsible for the pendency placement. For these reasons, the Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20817

[Filed September 9, 2009]

HOUSTON INDEPENDENT SCHOOL DISTRICT)
)
Plaintiff - Appellee-Cross-Appellant)
)
v.)
)
VP by next friend, Juan and Sylvia P)
)
Defendant - Appellant-Cross-Appellee)

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:05-CV-1686

ON PETITION FOR REHEARING

(Opinion 4/23/09, 5th Cir., 566 F.3d 459)

Before BENAVIDES, SOUTHWICK, and HAYNES, Circuit Judges. LESLIE H. SOUTHWICK, Circuit Judge:

No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. We also deny Panel Rehearing but withdraw our prior opinion, issued on April 23, 2009, and substitute the following.

The Houston Independent School District (HISD) initiated the present action in the district court as an appeal of an administrative decision that HISD had denied a child a free appropriate public education. The relevant statute is the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Reimbursement for a year of private school placement was awarded. The district court affirmed the decision. The court denied reimbursement for the private school placement during a second school year that occurred during the pendency of the proceedings. Both parties were aggrieved and appeal. We AFFIRM as to the reimbursement for the first school year, REVERSE and RENDER as to the second year, and REMAND for further proceedings as to attorney's fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

The child whose needs are at the center of this dispute is referred to as V.P. to protect her privacy. At the time of the administrative hearing, V.P. was an eight-year-old student within the jurisdictional boundaries of HISD. V.P. qualified as a child with a disability entitled to receive special education services under the IDEA due to her auditory and speech impairments. HISD first identified V.P. as a child eligible for special education when she was four years old. Accordingly, HISD placed V.P. in the Preschool

Program for Children with Disabilities at Garden Oaks Elementary. It developed an individualized education plan (IEP) to address her language delays. After three weeks at Garden Oaks, V.P.'s mother obtained a transfer for her daughter to Wainwright Elementary School, where V.P.'s mother was employed. V.P. remained in a regular education, pre-kindergarten classroom at Wainwright Elementary for the remainder of the 2001-2002 school year.

A. 2002-2003 School Year

In 2002, V.P. began kindergarten in a regular education classroom at Wainwright. In October 2002, an Admission, Review, and Dismissal Committee ("IEP Committee" or "Committee")[1] met to develop an IEP for V.P.'s kindergarten year. The IEP Committee continued the identification of V.P. as a child with a speech impairment and approved two hours per week of speech therapy, along with classroom modifications. In the spring of 2003, V.P.'s parents obtained hearing aids for V.P., including a pair of loaner hearing aids in February 2003 and her own custom aids in May 2003.

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[1] In Texas, those who prepare an IEP are known as an Admissions, Review, and Dismissal Committee. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997). The IEP Committee includes the parents of the child with a disability, at least one of the child's regular education teachers, at least one special education teacher, a qualified representative of the school district (the local educational agency), an individual who can interpret "the instructional implications of evaluation results," other individuals who have knowledge or special expertise regarding the child (included at the discretion of the parent or agency), and, when appropriate, the child with a disability. 20 U.S.C. § 1414(d)(1)(B); *see also Michael F.*, 118 F.3d at 247.

In May 2003, V.P.'s IEP Committee met to evaluate V.P.'s progress under her current IEP and to prepare for the next school year. The Committee considered whether V.P. had a hearing impairment that would qualify her for special education services as a student with an auditory impairment. Finding that she did, it developed an IEP for audiological management for the 2003-2004 school year recommending that V.P. remain in a regular education classroom with modifications and teaching strategies designed to accommodate her hearing impairment. The Committee continued V.P.'s identification as a child with a speech impairment and continued two hours of speech therapy per week. Additionally, in May 2003, V.P. was provided with an FM loop system in her classroom for the last week of her kindergarten year.

B. 2003-2004 School Year

In October 2003, which was six weeks into V.P.'s first-grade year, her IEP Committee was convened to review her IEP in light of concerns expressed by V.P.'s mother and also by her classroom teacher, Ms. Williams, regarding V.P.'s academic performance and progress and whether a more restrictive educational placement was needed. The Committee continued V.P.'s identification as a child with auditory and speech impairments. The Committee further determined that V.P. should remain in a regular education classroom, but it approved the implementation of additional special education services and modifications within the regular education setting, including in-class support, frequent

breaks, content mastery,[2] and speech therapy. In addition to other recommendations, it requested additional testing, including a new audiological evaluation, new achievement testing, and an observation by an auditory impairment specialist.

The IEP Committee met again in January 2004 to discuss V.P.'s progress and the results of the additional testing. The Committee continued V.P.'s classification as a child with auditory and speech impairments. She would remain in the regular education classroom. The Committee continued V.P.'s placement in two hours of speech therapy per week and approved additional classroom modifications, including amplification, visual cues, having the teacher try to face V.P., preferential classroom seating, and questioning to check understanding. The Committee also developed an IEP to address V.P.'s language and listening skills. Under this IEP, an itinerant teacher for the auditory-impaired was to work with V.P. for one hour per week. Additionally, the Committee incorporated Earobics computer software as a special education service to address V.P.'s auditory-processing weakness.[3] The Committee requested a new speech and language assessment.

In May 2004, V.P.'s IEP Committee met to evaluate V.P.'s progress and consider her placement for V.P.'s

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[2] Content mastery is a special education service in which students obtain additional assistance or modifications from a special education teacher outside of the general education classroom.

[3] Earobics is a computer software program that helps children develop phonological awareness and auditory processing tools, which serve as foundational skills for learning to read.

second-grade year, starting that fall. The Committee continued V.P.'s identification as a child with auditory and speech impairments. It then developed an IEP for the remainder of the 2003-2004 school year and the full 2004-2005 school year. For 2004-2005, which was V.P.'s second-grade year, the Committee recommended that V.P. remain in a regular education classroom with special education and related services similar to those provided during the prior school year, including two hours per week of speech therapy, one hour per week with the itinerant teacher for the auditory-impaired, amplification, visual cues, teacher facing student, preferential classroom seating, and questioning to test understanding. V.P.'s mother disagreed with the proposed IEP for 2004-2005 and indicated that she wished to withdraw V.P. from HISD and place her in a private institution. The Committee held a "recess meeting" in an effort to resolve the situation, but V.P.'s parents ultimately decided to withdraw V.P. one week before the end of the 2003-2004 school year.

C. 2004-2005 School Year

In September 2004, V.P.'s parents enrolled V.P. in a kindergarten/first-grade class at the Parish School, a private school for children with language-learning disabilities. At the Parish School, V.P. was in a small classroom with ten students, a teacher, and an assistant teacher. Through the Parish School, V.P. also worked with the Carruth Center, which provided language services to Parish School students. V.P. received ten hours of group speech/language therapy per week. Speech pathologists provided therapy addressing V.P.'s receptive and expressive language skills. V.P. also received phonemic awareness training, auditory memory training, and gap-detection training

through the Fast ForWord computer program. Additionally, the Parish School attempted to minimize V.P.'s exposure to ambient noise whenever possible in an effort to promote noise desensitization. V.P.'s Parish School curriculum also included sequencing exercises to improve her auditory-processing skills.

In addition to the 2004-2005 school year, V.P. remained at the Parish School for the 2005-2006 school year during the district court's review of the hearing officer's decision. No issues regarding later years are raised.

D. Procedural History

In August 2004, V.P.'s parents requested a special education due process hearing before the Texas Education Agency to address whether HISD failed to provide V.P. with a free appropriate public education, failed to develop or implement IEPs reasonably calculated to provide V.P. with educational benefit, and failed to consider an appropriate placement for V.P. The Texas Education Agency hearing officer held a due process hearing in December 2004 and issued a decision in February 2005. The hearing officer concluded that V.P. has extensive language development and auditory-processing problems stemming from sensory hearing loss and an auditory-processing disorder. The hearing officer found that V.P. requires auditory training, memory training, phonemic awareness training, noise desensitization, sequencing ability training, gap-detection training, onset-time training, visual instruction, and an FM loop system to meet her educational needs. The hearing officer concluded that HISD failed to include many of these necessary services in V.P.'s IEPs, including noise

desensitization training, gap-detection training, and sequencing training. Ultimately, the hearing officer determined that HISD did not provide V.P. with a free appropriate public education and that the Parish School was an appropriate placement for V.P. Accordingly, the hearing officer awarded V.P.'s parents reimbursement for V.P.'s 2004-2005 placement at the Parish School.

In May 2005, HISD appealed the hearing officer's decision to the district court. V.P. filed an answer and counterclaim in June 2005, appealing the hearing officer's decisions on the issues for which she did not prevail at the due process hearing. V.P.'s answer and counterclaim did not specifically seek payment for V.P.'s 2005-2006 placement at the Parish School. In September 2005, during a Rule 16 scheduling hearing, V.P. informed the court that she intended to introduce evidence in addition to the administrative record for the district court's consideration on appeal.[4] Months later, in June 2006, V.P. filed a motion to submit additional evidence in which she indicated that she intended to introduce reimbursement evidence regarding the costs of V.P.'s placement at the Parish School for the 2005-2006 school year.

In March 2007, the district court granted partial summary judgment in V.P.'s favor. The court affirmed the hearing officer's determination that HISD failed to

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[4] The IDEA provides that a court reviewing a state hearing officer's decision "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(c).

provide V.P. with a free appropriate public education, failed to develop educationally beneficial IEPs, and failed to consider an appropriate placement for V.P. It further affirmed the hearing officer's decision that V.P. is entitled to reimbursement for the 2004-2005 Parish School placement. With respect to the 2005-2006 Parish School costs, the court refrained from addressing that issue because V.P. had not moved for summary judgment on it.

The court then requested additional record development regarding the appropriate amount of reimbursement to be awarded. The parties stipulated that $16,125.30 was the proper reimbursement for the 2004-2005 school year and the amount would also be appropriate should reimbursement for the 2005-2006 placement be awarded. After the filing of cross motions for summary judgment, the Court denied reimbursement for the 2005-2006 school year.

V.P. now appeals, arguing that the district court erred in failing to award reimbursement for V.P.'s 2005-2006 Parish School placement and the attorney's fees and costs expended in seeking such reimbursement. HISD has filed a cross-appeal alleging that the district court erred in concluding that it failed to provide V.P. with a free appropriate public education.

II. DISCUSSION

A. Free Appropriate Public Education

When a district court reviews a hearing officer's decision under the IDEA program, it receives the records of the administrative proceedings and also

takes additional evidence at the request of any party. "Although the district court must accord 'due weight' to the hearing officer's findings, the court must ultimately reach an independent decision based on a preponderance of the evidence." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 252 (5th Cir. 1997) (citations omitted); *see also* 20 U.S.C. 1415(i)(2)(c); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 205–07 (1982). Thus, the district court's review is "virtually *de novo*." *Michael F.*, 118 F.3d at 252.

We, in turn, review a district court's decision concerning the propriety of a local school district's IEP and the need for an alternative placement *de novo* as a mixed question of law and fact. *Id.* "The district court's findings of underlying fact, such as findings that a disabled student obtained educational benefits under an IEP, are reviewed for clear error." *Id.* (citation omitted). The clear error standard of review "precludes reversal of a district court's findings unless [the court is] left with a definite and firm conviction that a mistake has been committed." *Jauch v. Nautical Servs., Inc.*, 470 F.3d 207, 213 (5th Cir. 2006) (internal quotation marks and citation omitted). The party challenging the appropriateness of an IEP bears the burden of demonstrating that the IEP and resulting placement were inappropriate under the requirements of the IDEA. *Id.* (citation omitted).

One of the primary purposes of the IDEA is to ensure that children with disabilities receive a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education,

employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). As "a local educational agency responsible for complying with the IDEA as a condition of the State of Texas'[s] receipt of federal education funding," HISD must "(1) provide each disabled child within its jurisdictional boundaries with a 'free appropriate public education' tailored to his unique needs, and (2) assure that such education is offered . . . in the least restrictive environment consistent with the disabled student's needs." *Michael F.*, 118 F.3d at 247 (citations omitted). These requirements are implemented through HISD's development of IEPs for its disabled students. *Id.* Through a child's IEP, HISD must provide a "basic floor of opportunity" that "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the [disabled] child." *Rowley*, 458 U.S. at 201. HISD need not provide its disabled students with the best possible education, nor one that will maximize the student's educational potential. *Michael F.*, 118 F.3d at 247 (citing *Rowley*, 458 U.S. at 188–89). "Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or *de minimis*; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement." *Id.* at 248 (internal quotation marks and citation omitted). In short, HISD must provide its students with "meaningful" educational benefit. *Id.*

When a parent challenges the appropriateness of an IEP, a reviewing court's inquiry is twofold. The court must first ask whether the state has complied with the procedural requirements of the IDEA, and then determine whether the IEP developed through such procedures was "reasonably calculated to enable

the child to receive educational benefits." *Rowley*, 458 U.S. at 206–07. If the court finds that the state has not provided an appropriate educational placement, the court may require the school district to reimburse the child's parents for the costs of sending the child to an appropriate private school or institution. *Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985); *Michael F.*, 118 F.3d at 248. Reimbursement may be ordered only if it is shown "that (1) an IEP calling for placement in a public school was inappropriate under the IDEA, and (2) the private school placement . . . was proper under the Act." *Michael F.*, 118 F.3d at 248 (citations omitted).

HISD argues that the district court erred in concluding that it failed to provide V.P. with a free appropriate public education. Despite V.P.'s disabilities, HISD asserts she was receiving a meaningful educational benefit, including earning a promotion from first to second grade under the same standards that apply to non-disabled first graders. HISD further contends that the IDEA does not require it to provide V.P. with an education designed to remediate her disability or to ensure optimal performance, and it maintains that the district court erred in concluding that it should have implemented every aspect of the program recommended by V.P.'s expert witness.

We have set out four factors that serve as "indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA," and these factors are whether "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3)

the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." *Id.* at 253; *see also Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810 (5th Cir. 2003). Both the hearing officer and the district court found that all of these considerations militated in favor of finding that HISD failed to provide V.P. with a free appropriate public education. We will deferentially review the district court's fact findings with respect to each of these factors. We will also give *de novo* consideration to any legal issues that arise under each.

1. Individualized program on the basis of V.P.'s assessment and performance

The district court found that V.P.'s IEPs were not sufficiently individualized to her needs. The court pointed to these deficiencies: as of May 2004, more than a year after V.P.'s IEP Committee recommended an audiological evaluation, the evaluation still had not been completed; V.P.'s IEPs were not specific enough with regard to V.P.'s auditory-processing or audiological deficiencies because they lacked strategies to assist with sequencing, gap detection, and noise desensitization; although the Committee recognized that V.P.'s most significant problems were speech and language deficiencies due to hearing loss, it did not integrate special education sessions with a teacher for hearing-impaired students until January 2004; and the Committee did not address problems that developed with V.P.'s FM loop system in September 2003.

HISD argues that each of the bases for the district court's finding are erroneous. Initially, it asserts that a school district is not required to furnish every special service necessary to maximize a child's potential. Consequently, HISD's failure to provide V.P. with sequencing training, gap detection, and noise desensitization did not render V.P.'s IEP inadequate. Instead, HISD maintains that these services were programs suggested by V.P.'s expert witness to remediate V.P.'s speech and auditory-processing disorder, and the fact that HISD failed to provide these services does not mean that V.P.'s needs were not being addressed. HISD further maintains that it should not be penalized for failing to include an explanation concerning the problems with V.P.'s FM loop system in the IEP Committee minutes. HISD points out that the problem was caught and corrected, and there is no requirement that the Committee's notes include all issues that arise on a day-to-day basis.

V.P.'s IEP included several accommodations and modifications to address her general speech and auditory impairments, such as limited speech therapy (two hours per week), visual cues, preferential classroom seating, questioning to check understanding, an FM loop system, content mastery classes, and limited instruction by an itinerant teacher for the auditory impaired (one hour per week). However, these services failed adequately to address V.P.'s distinct auditory-processing disorder.

V.P.'s expert witness, Dr. Ray Battin, a neuropsychologist and audiologist, testified that he performed an advanced audiological evaluation on V.P. in October 2004. Battin's evaluation revealed that V.P.

has moderate to severe sensory hearing loss and severe auditory-processing problems. To address these problems, Battin explained that V.P. requires noise desensitization, sequencing training, and gap-detection work and that V.P.'s May 2004 IEP did not address those needs. Battin noted that although the May 2004 IEP was good for V.P.'s expressive language delay problems, it was inappropriate to address her auditory-processing disorder. In fact, Battin testified that V.P. needed a separate IEP for her auditory-processing disorder.

In light of Battin's testimony, we find no clear error with the district court's finding that noise desensitization, sequencing training, and gap-detection work were necessary to address V.P.'s specific auditory-processing problems. Further, there was evidence to support that they were not offered merely as a means of maximizing her potential or making her more competitive with the other members of her class. Based on the valid fact-finding concerning what was necessary to address her auditory needs, and applying our *de novo* review, we accept that her IEP was insufficiently individualized.

2. Program administered in the least restrictive environment

The IDEA requires that children with a disability be provided a free appropriate public education in the least restrictive environment:

> To the maximum extent appropriate, children with disabilities . . . [should be] educated with children who are not disabled, and special classes, separate schooling, or other removal of

> children with disabilities from the regular educational environment [should occur] only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A).

The district court concluded that V.P.'s IEP did not provide her with sufficient supplementary services to be successful in the general education classroom. In reaching this conclusion, the court explained that it was not concerned with whether V.P. was mainstreamed to the maximum extent possible; instead, it was addressing whether V.P. was mainstreamed beyond her capabilities. The court noted several deficiencies in V.P.'s ability to benefit satisfactorily from her education in the regular classroom, including her failure to attend content mastery training after the fall of 2003. There was evidence that although V.P. paid attention to the teacher's portion of a lesson, she was unable to participate in the group portion of a lesson. Further, she could remain focused on her assignment only for short periods of time without redirection. The court also explained that V.P.'s FM system did not allow her the benefit of class discussion. There is no record evidence that the proposed solution to this problem (having the teacher pass the microphone around the class during discussion) was ever implemented. The court also noted that when the loop component of the system was unavailable, V.P.'s use of headphones further limited her ability to hear her classmates and participate in class discussions. Finally, the court pointed out that after V.P. lost her hearing aids on the

playground, she regularly took them off before going out for recess. Nothing in the record suggests that the IEP Committee attempted to address this problem with V.P. or her parents. Thus, V.P. was restricted in her ability to communicate and socialize with other students during recess.

Without conceding the point, HISD maintains that even if the district court was correct in finding V.P.'s placement improper, the appropriate remedy would be to require the school to provide additional supplementary aids and services in the general education environment or to allow V.P. to attend a combination of regular and special education classes. Additionally, HISD contends that because of the nature of V.P.'s disability, exposure to the language models of non-disabled peers is important to V.P.'s progress.

V.P.'s regular education placement was certainly a less restrictive environment than her Parish School placement. However, the IDEA mandates that a child be placed in the least restrictive environment in which the child can achieve an *appropriate* education. *See* 20 U.S.C. § 1412(a)(5)(A). The IDEA's strong preference in favor of mainstreaming must "be weighed in tandem with the Act's principal goal of ensuring that the public schools provide [disabled] children with a free appropriate public education." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044–45, 1048 (5th Cir. 1989) (internal quotation marks and citation omitted).

Though HISD tried to accommodate V.P. in a regular education classroom, the district court concluded that V.P. was not receiving a meaningful educational benefit from such placement. Although

exposure to the language models of V.P.'s non-disabled peers is important, V.P.'s interaction with her peers within the regular education classroom was significantly limited. Under the FM loop system, only V.P.'s teacher wore a microphone. Accordingly, V.P. was not receiving amplification of her peers during class and group discussions. Additionally, because V.P. removed her hearing aids during recess, she was not able to interact effectively with her peers during a significant portion of her time outside of class. The district court's fact-finding regarding the difficulties that arose due to her placement in the general classroom, including that there were insufficient supplemental services, is not clearly erroneous. Applying a *de novo review*, we agree that V.P.'s IEP failed to provide her with the least restrictive environment appropriate to her condition.

3. Coordinated and collaborative services provided by key stakeholders

The district court concluded that the services HISD provided V.P. were not coordinated and collaborative. The court explained that although V.P.'s IEP Committee meetings were well attended and generally included the key stakeholders, the participants failed to communicate and collaborate outside of the meetings. For example, the special education chair never discussed V.P.'s progress with her classroom teacher outside of the meetings, and V.P.'s classroom teacher never discussed V.P.'s progress with V.P.'s writing teacher or other school staff outside of the Committee meetings. Furthermore, when V.P.'s classroom teacher missed a meeting in January 2004, the record does not reflect that anyone informed her of the modifications made in that meeting, even though

their implementation required the teacher's involvement. Additionally, the special education chair instructed V.P.'s classroom teacher to modify V.P.'s regular tests and assignments, but no such modifications were adopted by the Committee.

The district court also noted that the HISD staff "struggled with training and followup." The court concluded that the one-page flyer provided to train school staff on working with hearing-impaired students was inadequate. Furthermore, the school nurse who was assigned to maintain V.P.'s FM system received little training and provided little training to the other staff members. The nurse did not attend the IEP Committee meetings and did not adequately communicate with others to repair V.P.'s FM loop system in a timely fashion. Finally, school staff did not follow up on V.P.'s failure to attend content mastery for more than two months or on an October 2003 Committee plan to try proposed modifications at Wainwright for thirty days before revisiting the possibility of placing V.P. in Sutton Elementary's oral deaf program.

HISD maintains that these isolated occurrences are insufficient to show that it failed to implement substantial or significant provisions of V.P.'s IEP, that the services it provided were sufficient to confer an educational benefit upon V.P, and that the district court's determination that it failed to implement the content mastery provision of V.P.'s IEP is not supported by the record evidence. According to HISD, V.P.'s mother made the decision to prohibit V.P. from attending content mastery, and it could not force her to attend over her mother's instructions to the contrary. HISD further responds that the IEP

Committee met multiple times during the school year to discuss V.P.'s progress and adjust her program accordingly, and that there was testimony from other teachers indicating that they communicated frequently about V.P., including testimony from V.P.'s classroom teacher that she often talked with V.P.'s mother and testimony from V.P.'s speech teacher that she worked closely with all of V.P.'s teachers.

"[A] party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Id.* at 349 n.2.

The fact-findings by the district court that are fundamental to the conclusions on this factor are sound. First, we find no clear error that poor communication and collaboration between the Wainwright school nurse and others assigned to monitor the system led to the problems with the FM loop system being out of service for approximately two months. Furthermore, while the FM loop was broken, school personnel allowed V.P. to wear the alternative headphone system over her hearing aids. There was no error in finding that to be improper and potentially harmful. Further, there is evidence that the special education chair instructed V.P.'s classroom teacher to provide testing and assignment modifications without such modifications being included in V.P.'s IEP. The

special education chair's unilateral decision to change the IEP suggests a lack of coordination and collaboration with V.P.'s other key stakeholders. Next, it was not clearly erroneous for the court to find that the IEP Committee did not communicate effectively and collaborate to address V.P.'s failure to attend content mastery. Although there is evidence that V.P.'s mother made the decision to remove V.P. temporarily from the service, the school staff failed to follow up on V.P.'s extended absence. Finally, V.P.'s classroom teacher testified that in November 2003, V.P.'s one-on-one aide stopped coming to work with V.P. for approximately three to four weeks at the direction of the school principal, despite the fact that V.P.'s IEP called for one-on-one assistance.

In addition to problems with the implementation of V.P.'s IEP, the district court did not clearly err in finding that V.P.'s key stakeholders received inadequate training. Although the school provided its personnel with a one-page tip sheet for working with an auditory or speech impaired child, such minimal training was insufficient. Moreover, despite such training, V.P.'s classroom teacher, one of the most important stakeholders, explained that she was unable to communicate effectively with V.P. and evaluate her progress.

4. Demonstration of positive academic and non-academic benefits

Perhaps one of the most critical factors in this analysis is the final one. This factor seeks to determine whether the student was obtaining benefits from the IEP. *Michael F.*, 118 F.3d at 252. There are subordinate components of the fact-finding, perhaps

best thought of as evaluating the validity of the various measures of the progress that were offered. It is difficult analytically to compartmentalize all the determinations as ones of fact and ones of law, but we will proceed to make that effort.

The district court concluded that V.P. made only minimal progress, and the benefits she received were not meaningful. The court noted that there was conflicting testimony regarding V.P.'s progress at Wainwright – V.P.'s mother and classroom teacher were not encouraged by V.P.'s progress; V.P.'s speech therapist included both positive and negative impressions of V.P.'s advancement; and V.P.'s standardized speech and language test scores did not improve over time. The court explained that V.P. failed language arts and reading during the first two nine-weeks of the fall semester. Her grades then improved when her teacher implemented test and assignment modifications; however, her teacher testified that she would not have achieved passing grades without the modifications. Furthermore, although V.P. met the promotion standards for second grade, based on her grades with the modifications and the district standards for standardized testing with modifications, her classroom teacher testified that V.P. had not mastered the curriculum necessary to be successful in second grade.

HISD contends that V.P. demonstrated academic advancement because she achieved passing grades in her regular education program sufficient to advance to the next grade, her standardized scores show that she achieved the level of educational benefit required by the IDEA, and she mastered the high frequency words required for promotion. HISD maintains that the

district court improperly considered V.P.'s standardized speech and language test scores. HISD notes that such scores are percentile scores that merely compare V.P.'s scores to those of other children who took the test, and V.P.'s development should be measured with respect to her individual progress, not her abilities in relation to the rest of the class. HISD also points to objective evidence indicating that V.P. was receiving an educational benefit from her HISD placement, arguing that V.P.'s speech and language skills suggested three years of progress in the three years she was in HISD, and achievement testing in November 2003 indicated that V.P. was performing at or near the first-grade level in most areas.

HISD further alleges that the IDEA does not require a school district to ensure that a disabled child is able to advance at a rate faster than non-disabled peers. Even when a disabled child falls further behind her peers, she may still be receiving some educational benefit from the placement. HISD attributes V.P.'s speech therapist's equivocal responses regarding her progress to the requirement that the therapist assess both V.P.'s strengths and weaknesses in the classroom. HISD asserts that V.P.'s weaknesses show that V.P. continues to have a disability and do not indicate that she has not received a free appropriate public education. Finally, HISD argues that the testimony of V.P.'s teacher that V.P. would need modifications to perform well in second grade does not support the district court's conclusion that V.P.'s progress was minimal.

Urged strongly upon us as a controlling precedent, particularly in light of the point about test scores, is a 2000 decision of this court also involving HISD. *See*

Bobby R., 200 F.3d 341. In that case, we considered whether HISD provided a free appropriate public education to a student with speech disabilities. Only the third and fourth factors that we have discussed here were at issue in *Bobby R.*: were the services required in the child's IEP provided in a coordinated and collaborative manner, and had the child demonstrated academic and nonacademic benefits from his IEP? *Id.* at 348. What is most relevant here is the discussion of this last factor. We will review our prior analysis.

We start with context. In applying *Bobby R.*, it is of some relevance that the court was considering whether the district court *clearly erred* in finding that a child *was* receiving a meaningful educational benefit. Here, the issue is whether the district court *clearly erred* in finding that V.P. *was not* receiving a meaningful educational benefit.

The student, Bobby R., argued that where he stood in relation to his nondisabled peers was the best measure of his academic performance, whereas HISD maintained that passing scores and advancement from grade to grade was the proper indicia of academic progress. *Id.* We sided with HISD:

> a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of educational benefit, but only a child's inability to maintain the same level of academic progress achieved by his non-disabled peers.

Id. The court pointed out that the test scores and grade levels in a number of subjects had improved during the child's years in HISD. *Id.* It concluded that the improvements were not trivial and that no clear error existed in the district court's factual determination that the child was receiving educational benefits from his IEP. 200 F.3d at 350. It was not necessary for the child "to improve in *every* area to obtain an educational benefit," as maximization of a disabled student's educational potential is not required. *Id.*

HISD argues that just as in *Bobby R.*, V.P. had improved test scores and advanced to a new grade level. Therefore, the district court is said to have erred in determining that she did not receive more than a minimal educational benefit from her IEP. Even though her test scores improved and she was advanced only after her teacher implemented modifications in her assignments and tests, HISD argues that such modifications are permitted under the IDEA. HISD also submits that a failure to master curriculum cannot be determined by comparing V.P.'s success to that of her non-disabled peers.

We find the district court's rulings on this fourth factor to be consistent with *Bobby R.* In the present case, passing grades and yearly advancement were not found to be adequate measures because V.P.'s teacher testified that the improved grades and advancement resulted from modifications the special education director unilaterally imposed. The IEP Committee itself never evaluated the changes and determined whether they were consistent with the requirements of the IDEA. V.P.'s teacher testified that V.P. *would not*

have made passing grades and advanced to a new grade-level without these unauthorized modifications.

Modifications to an IEP legally can and likely often must be made in response to the experiences of a child in the classroom. However, before acceptable test scores and advancement in class grade can be seen as supporting that educational benefits are being received, those indicia must arise from compliance and not deviation from the IEP.

In evaluating this evidence, we are guided by the requirement that HISD is to provide V.P. with a "basic floor of opportunity" that "consists of access to specialized instruction and related services" individually designed to provide V.P. with educational benefit. *Rowley*, 458 U.S. at 201. HISD did not need to provide V.P. with the best possible education or one that will maximize her potential; however, the education benefits it provides cannot be *de minimis*. *Michael F.*, 118 F.3d at 247 (citing *Rowley*, 458 U.S. at 188-89). This distinction may well be the key to the dispute before us. HISD clearly was taking steps to provide educational benefits to V.P. The question is not whether there was more that could be done, but only whether there was more that had to be done under the governing statute.

Passing grades and advancement from year to year are factors that indicate a child is receiving meaningful educational benefit. As a legal matter, we find that such evidence should be rejected when it is found to be the product of unapproved deviations from the IEP. V.P.'s classroom teacher, the stakeholder most familiar with V.P.'s performance, testified that although V.P. did not do well the first or second

semester of her first-grade year, her grades improved near the end of the year *only because* the teacher started modifying more work product for her, including giving her fewer test items. Without these modifications, the teacher stated, V.P. could not have done work on the curriculum level with the non-disabled students in her class and could not have made passing grades. The teacher explained that she made these modifications because the special education chair told her that they were part of V.P.'s IEP. However, V.P.'s IEP did not provide for modified curriculum or tests, and her teacher stated that she would have been concerned about making the modifications if she knew they were not in V.P.'s IEP. Finally, the teacher testified that despite V.P.'s passing grades, she did not believe V.P. mastered the curriculum necessary to move on to second grade.

Considering the testimony of V.P.'s teacher, the district court did not clearly err in concluding that the test scores were not reliable evidence of progress. The district court's factual determination that the child was not receiving educational benefits from her IEP was not clear error. As we said in *Bobby R.*, it is not necessary for the child "to improve in *every* area to obtain an educational benefit," 200 F.3d at 350, but there was no evidence here that had to be accepted that V.P. was improving in many areas at all.

The ultimate legal issue under this factor is whether V.P. was receiving a meaningful educational benefit from the services provided for her under her IEP. We find that she was not.

Therefore, we sustain the district court's finding that under the four factors, HISD was not providing a

free appropriate public education. Consequently, V.P.'s move to the Parish School was justified.

B. Reimbursement for Pendency Placement

Our previous discussion leads to our affirming the award of $16,125.30 to reimburse V.P. for the payments to the Parish School for the 2004-2005 school year. Our last issue is whether HISD must make the same payment for the 2005-2006 school year.

In ruling on the cross motions for summary judgment on the 2005-2006 reimbursement issue, the district court again fully adopted the magistrate judge's findings. We will refer to the findings as those of the district court.

The components of this last issue are these: (1) what relevance to the second year's reimbursement is the Texas Education Agency's decision that the Parish School was the appropriate placement, (2) how was the issue of the second year's reimbursement raised, opposed, and resolved, and (3) was the issue properly resolved? We will discuss them in that order.

1. Hearing officer's decision that Parish School was proper placement

The IDEA provides that "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child . . . ." 20 U.S.C. § 1415(j). The Supreme Court held that an administrative decision in favor of parents who had placed their child in a private school after they rejected

a proposed IEP constitutes an agreement by the state to the change of the child's placement, making the new, private school placement the current educational placement of the child. *Burlington*, 471 U.S. at 371–72.

Accordingly, by force of Supreme Court opinion and federal regulation, the decision by the Texas Education Agency hearing officer on February 10, 2005, was an agreement between HISD and V.P.'s parents that the Parish School was the appropriate placement. The agreement lasts for the pendency of the review of the administrative decision. The regulation does not state that a parent needs to file for a court order declaring the alternative placement to be the correct one. Instead, unless the parents and school district agree otherwise, the Parish School by operation of law is the proper placement. *Id.*

Our case law is consistent with this interpretation. We have addressed related issues that arise when parents seek to have the public school district pay the costs of the private school pending the final review of the merits. *St. Tammany Parish Sch. Bd. v. Louisiana*, 142 F.3d 776, 785 (5th Cir. 1998). There, as here, the state administrative process resulted in an order that a private placement was appropriate because the public school education was inadequate. *Id.* at 780. The administrative process ended in April of a school year, and the administrative ruling was that the entire school year should be paid for by the public school. *Id.* Also, as here, the school district filed an appeal in district court in April. Unlike here, in June, the *St. Tammany* parents counterclaimed for compensation for the next school year. *Id.* at 781. Such a counterclaim is what HISD argued and the district judge accepted had to be made here, but it never was.

The *St. Tammany* parents sought an order declaring the private school placement to be the correct one, and requiring payments for the next school year to be made by the public school district. In August, as the new school year was beginning, the district court granted the parents their requested relief. *Id.*

The district court's ruling was immediately appealed. *Id.* We concluded that a stay-put order qualifies as a collateral order for purposes of interlocutory appeal because it conclusively determines a student's pendency placement and the tuition reimbursement rights associated with such placement. *Id.* at 781–82. In support of this holding, we cited a case from another circuit that found resolution of pendency-placement issues to be "completely separate from the merits issues which focus on adequacy of the proposed IEP; and the propriety of the pendent placement and the concomitant financial responsibility are not effectively reviewable on appeal of a decision on the merits." *Id.* at 782 (citing *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 81 n.4 (3d Cir. 1996)); *see also Mackey ex rel. Thomas M. v. Bd. of Educ. for the Arlington Cent. Sch. Dist.*, 386 F.3d 158, 160 (2d Cir. 2004) ("A claim for tuition reimbursement pursuant to the stay-put provision is evaluated independently from the evaluation of a claim for tuition reimbursement pursuant to the inadequacy of an IEP.").

In *St. Tammany*, the district court ordered payment for tuition and other costs for the school year that was about to begin. We affirmed. The Third Circuit case on which we relied also reviewed such a district court order. *Susquenita Sch. Dist.*, 96 F.3d at 85. In that case, the school district appealed the

administrative decision to the district court and filed for a stay of the requirement that it reimburse the parents for the private school placement. The district court denied the motion. On interlocutory appeal, the Third Circuit concluded that the school district was required to pay for the child's private school placement from the point of the administrative decision forward; it also held that the school district "may be required to pay for tuition and expenses associated with a pendent placement prior to the conclusion of the litigation." *Id.* at 84. The court explained that "[t]he purpose of the Act . . . is not advanced by requiring parents, who have succeeded in obtaining a ruling that a proposed IEP is inadequate, to front the funds for continued private education." *Id.* at 86–87.

What is of particular importance for our issue is that the court considered the right to continuing payments to be automatic from the district court's decision that the private school would be the "current educational placement." "This holding also effectively decided the reimbursement question in favor of Raelee's parents." *Id.* at 80. That sentence was followed by a footnote, which concluded that once reimbursement for the first year was found to be appropriate, payments for continuing the private school placement were proper while proceedings under the statute were pending:

> The order encompassed reimbursement for expenses incurred in the 1994-1995 academic year. By adopting the appeals panel holding that the private school was the appropriate placement pending a contrary judicial order, Order # 1 also effectively made Susquenita financially responsible for continuing the

> private school placement. Order # 1 thus decided both reimbursement for and prospective payment of private school tuition.

Id. at 81 n.3. As the Supreme Court held, public payment of expenses of the "current education placement" flows from "the child's right to a *free* appropriate public education" under the IDEA. *Burlington*, 471 U.S. at 370. Reimbursement forces a school district "to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Id.* at 370–71. *Burlington* did not involve paying for costs during the pendency of the litigation. Neither were we in *St. Tammany* faced with deciding the propriety of such payments because the state did not contest that legal issue. *St. Tammany*, 142 F.3d at 783. Our issue today is almost the opposite: do parents forfeit the right to receive reimbursements for the costs of the private placement, which by operation of law is the "current educational placement" during the pendency of the litigation, if they do not ask for funding at the beginning of a school year?

In answering that question, we examine the arguments as to why the right to reimbursement for the education that is supposed to be free has been forfeited here. The district court denied reimbursement for V.P.'s second school year almost exclusively because of the lack of notice to HISD that anyone was contemplating asking for payment. It is true that V.P. did not amend her pleadings specifically to request reimbursement. Soon after the second school year ended, she did seek to supplement the record with the new bills. Even without any filings by V.P., notice existed as a matter of law that the Parish

School was the current educational placement until an agreement to the contrary or an end to the litigation was reached.

Relevant here is an issue still unresolved in this circuit, namely, if an order is entered that requires the public school district to pay for the private school during the pendency of the proceedings, will the parents have to refund the money if the private placement is later found to have been improper? *See id.* at 788 (stating, "we do not reach, nor do we express an opinion on, whether the State defendants are entitled under IDEA to reimbursement" if the private placement is held to have been unnecessary). We still do not need to resolve that point, but the issue highlights a choice for a child's parents. They can request payment-as-they-go, but they *may* have to refund that money if they lose on the merits. Or, they can continue to pay for the private placement until such time as there is a final decision on the merits. Many parents will not have a choice, as the private school will be beyond their financial means. When there is a choice, the parents do not need to seek prospective relief, which under *St. Tammany* is an appealable order. They may instead ask for costs of the pendency placement to be made an award at the end of the litigation. That does not mean, though, that the parents can wait until the end of the litigation to make the request. We address that issue below.

HISD counters that had it known V.P. would seek reimbursement for the 2005-2006 school year, it could have proposed an alternative placement. For example, in an effort to avoid paying for a second year of V.P.'s Parish School costs, HISD could have attempted to develop a new IEP that corrected the deficiencies

found by the due process hearing officer. Furthermore, HISD alleges it could have suggested an alternative placement at one of its schools, such as at the Sutton Elementary "oral deaf" program. HISD alleges V.P.'s delay kept it from appealing any intermediate order regarding the child's proper placement during the pendency of the district court proceedings.

HISD's position does not take into consideration that the Parish School was the proper placement for 2005-2006. We find useful guidance for HISD in *St. Tammany*. There, soon after the order was entered that the private school was the "current education placement," the school district moved to require a new IEP conference to determine how the public school could meet the child's needs. *Id.* The district court denied the motion. A similar motion by HISD is at least one way the issue of changing V.P.'s placement could have proceeded. Perhaps HISD did not know until the 2005-2006 school year was over that V.P. would actually request reimbursement, but it constructively knew that by operation of law, the Parish School was the continuing proper placement for the child and that HISD might be requested to pay for it. The moving party for ending the "current educational placement" at the Parish School and the concomitant, but as yet unasserted, financial reimbursement potential needed to be HISD.

It is also important that after the date of *Burlington*, *St. Tammany*, and the Third Circuit *Susquenita* opinion, the U.S. Department of Education adopted the regulation that expresses the effect of the final order in the administrative proceedings that a private placement is proper. Effective on March 12, 1999, a slightly different phrasing of what is now 34

C.F.R. § 300.518(d) was promulgated. It stated that when the decision of "a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section." 34 C.F.R. § 300.514(c) (as adopted by 64 Fed. Reg. 12418 (Mar. 12, 1999)). The referenced "paragraph (a)" is similar to Section 300.518(a), the earlier version stating that the child "during the pendency of any administrative or judicial proceeding . . . must remain in his or her current education placement." *Id.* § 300.514(a).

It is true that in *St. Tammany*, the district court had ordered that the private school be considered the "current educational placement." 142 F.3d at 781. There was no holding in *St. Tammany* that such an order was needed. We conclude that Section 300.518 makes that kind of order superfluous.

A correlation between a private school's being the current educational placement and the public school's responsibility to fund it, is found in the IDEA:

> (B) Children placed in, or referred to, private schools by public agencies
> (i) In general. Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of

> carrying out the requirements of this [subchapter]. . . .
>
> . . .
>
> (C) Payment for education of children enrolled in private schools without consent of or referral by the public agency
>
> . . .
>
> (ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412 (a)(10); *see also* 34 C.F.R. § 300.148(b).

These provisions allow a hearing officer to require reimbursement of private school costs when a free appropriate public education has not been made available. *Burlington* and Section 300.518 transform a hearing officer's order adopting a private placement into an agreement that the private school is necessary to carry out the requirements of the IDEA. That placement is at "no cost" to the parents of the child. 20 U.S.C. § 1412 (a)(10)(B)(i).

Pendency-placement issues are separate from the merits to the extent they can be decided prior to and without regard to the merits issues. We have noted that V.P.'s parents had a choice to request payments during the pendency of the litigation, or to forgo payment-as-they-go and await the conclusion of the merits case. Intentionally or otherwise, the request was not made until the end of the second school year. V.P. did not seek payments pending the litigation. Not raising this separate issue at the earliest opportunity does not by itself prevent receiving reimbursement for relevant school years at the end of the litigation.

We have examined with some care the case law and regulations. Two events are crucial in our analysis. The first is the decision by a hearing officer for the Texas Education Agency that the Parish School was an appropriate placement for V.P. The second was the affirmance of that decision on appeal. Those two events having occurred, V.P.'s parents were entitled to have their costs at the Parish School reimbursed – absent any default in requesting them, an issue we discuss below. Valid costs for a private school placement may be reimbursed at the end of litigation in which the parents prevail without regard to whether an order for payment during the pendency of the proceedings is sought. The costs will be the relevant ones during the time period that begins with the school year for which the district is ultimately found not to have proposed a placement reasonably calculated to provide a free appropriate public education. The period ends with the conclusion of the litigation. A school district may be able to seek, as occurred in *St. Tammany*, to change the educational placement during the pendency of the litigation. Whatever steps that involves certainly need not be

addressed now. Without such a change, the obligation for the proper public entities to pay for the private school exists.

Our holding does not resolve the issue of whether parents do not even need to ask for reimbursement. We now turn to just how the issue of reimbursement for a second year was injected in the appeal to the district court.

2. Raising and disposing of the reimbursement issue in district court

On February 10, 2005, the Texas Education Agency hearing officer declared the IEP to be inadequate. The Parish School was found to be an appropriate placement. V.P.'s parents were awarded payment for all of their daughter's 2004-2005 relevant expenses at the Parish School.

On May 10, 2005, HISD filed an appeal in district court.

On June 9, 2005, V.P. filed her answer and counterclaim, appealing the Hearing Officer's decisions on the issues for which she did not prevail at the due process hearing. This pleading did not include a claim for reimbursement for V.P.'s 2005-2006 placement at the Parish School.

During a September 8, 2005 Rule 16 scheduling hearing, V.P. first informed the court that she intended to introduce evidence in addition to the administrative record for the district court's consideration on appeal. V.P. did not explain what additional evidence she intended to introduce and did

not explain that the additional evidence pertained to V.P.'s 2005-2006 Parish School placement. HISD stated that it opposed the entry of additional evidence and that the case should be decided solely on the administrative record.

On June 9, 2006, exactly a year after V.P. filed her answer, V.P. filed a motion to submit additional evidence in which she indicated that she intended to introduce reimbursement evidence regarding the costs of V.P.'s placement at the Parish School for the 2005-2006 school year. In a June 20, 2006 response, HISD objected to the motion, arguing that the only issue before the court was the correctness of the Hearing Officer's decision regarding the 2004-2005 school year, and the 2005-2006 private school bills were irrelevant to that issue.

The case was eventually reassigned to a new district judge who requested a status report from the parties. In that report, V.P. again indicated that she needed to submit additional evidence regarding reimbursement for the 2005-2006 school year. On July 6, 2006, V.P. filed a supplemental motion to submit additional evidence. In this motion, V.P. alleged that the Parish School was the proper placement for V.P. during the pendency of HISD's appeal, and accordingly, "V.P. [was] entitled to an automatic injunction providing her with reimbursement for the placement during the appeal, and until such time as HISD offers her an appropriate placement."

HISD responded that V.P. was belatedly attempting to "amend her complaint" to assert a new claim for relief under the guise of a request to introduce additional evidence and that pendency

placement had not been made an issue in the case. In a reply brief, V.P. contended that the right to reimbursement for ongoing tuition at the Parish School is automatic and is merely a continuation of the issues decided by the administrative hearing officer. V.P. further stated that "reimbursement of the pendency placement is actually a cost which [she] is entitled to if she prevails in this matter" and that HISD has not demonstrated that it was surprised or prejudiced by the pendency reimbursement claim.

On August 9, 2006, the magistrate judge conducted a hearing regarding, among other things, V.P.'s motion to submit additional evidence. There were two items of evidence. One was a new affidavit from an expert, and the other were bills for the second school year. At the hearing, V.P. argued that the 2005-2006 Parish School bills were just an extension of the hearing officer's order and should be considered as a "cost issue" if the court decides to uphold that decision. The magistrate judge initially indicated she would deny V.P.'s request to submit the bills. Later in the hearing, in response to argument, the magistrate judge delayed decision until a future date, saying "yes, if this goes your way, yeah, we'll consider that, but right now to keep amending to put the school bills in, you know, you haven't won yet. And we'll cross that bridge when it comes to it." The magistrate judge and counsel for HISD then engaged in the following exchange:

> THE COURT: I mean it seems to me that if you lose and the hearing officer's decision is implemented, HISD is going to have to pay those bills, right? And we will have to know what they are.

> HISD COUNSEL: Well, irrespective – I don't necessarily agree to that, but irrespective of that, in terms of the [c]ourt's time– . . . it makes more sense for you to rule on the motion for summary judgment because if you rule for me, those issues will be moot . . . and we won't have to touch on them. If you rule on all that stuff now, you may be making rulings that you won't have to make.
>
> THE COURT: Right.

On March 2, 2007, the magistrate judge recommended granting in part and denying in part HISD's motion for summary judgment. With respect to the 2005-2006 Parish School costs, the memorandum explained that "[a]lthough [V.P.] requests reimbursement for the costs of the Parish School during the pendency of this review, she did not move for summary judgment on that issue. The court refrains from addressing that matter at this time." On March 22, 2007, the district judge entered an order adopting the recommendation.

The magistrate judge then ordered HISD and V.P. to file cross motions for summary judgment on the 2005-2006 reimbursement issue. On September 11, 2007, the magistrate judge recommended the denial of reimbursement for the 2005-2006 Parish School placement. The judge concluded that V.P.'s "late mention of additional and ongoing education costs at the Parish School does not properly meet the requisite timing and form necessary to put [HISD] on notice of the 2005-2006 reimbursement claim." The judge also held that the failure to add this claim to the pleadings meant it could not be awarded as "appropriate" relief

under the IDEA without ignoring the Federal Rules of Civil Procedure. Finally, the magistrate judge concluded that reimbursement for the 2005-2006 school year under the IDEA's "stay put" provision would be collateral to the court's review of the hearing officer's decision on the merits.[5] The district judge adopted the magistrate judge's memorandum and recommendation on October 4, 2007, over V.P.'s objections.

3. Resolution of the issue

This review of the procedural history reveals that V.P. raised the issue of reimbursement for the second school year by a motion to introduce additional evidence. The motion was filed one year after her answer and counterclaim, a month or so after the second school year ended, and one year before final judgment. She never moved to amend the answer and counterclaim.

Despite the intricacies of the federal statutes we are applying, the usual pleading rules remain relevant. The appeal by HISD to the district court started a lawsuit. An answer and counterclaim were filed, seeking certain relief. The request for prospective payments for the second school year could easily have been made in the initial pleadings by V.P. in district court. Or, a motion for leave to amend could later have been made when the school year was over, seeking reimbursement. Amendments to pleadings are to be

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[5] We note an inconsistency in the conclusion that the claim was not properly in the case, but also that summary judgment should be granted to HISD on the claim.

allowed when "justice so requires . . . ." Fed. R. Civ. P. 15(a)(2). Because no amendment was ever requested, the justice of such a motion is not before us.

V.P. maintains that her request in her counterclaim that the district court uphold the hearing officer's decision was sufficient to raise her right to reimbursement for the 2005-2006 Parish School placement. Under the stay-put or pendency-placement provision of the IDEA, V.P. argues that she became eligible for reimbursement for the 2005-2006 Parish School tuition once the placement for 2004-2005 was upheld. Under her theory, she did not need to file a specific pleading or bring a separate action asserting a claim for pendency-placement reimbursement to obtain such relief.

HISD argues that it would be prejudicial to require pendency-placement reimbursement without a timely and explicit claim for such relief. If V.P. had sought an order from the hearing officer or the district court regarding the 2005-2006 pendency placement, HISD alleges it would have had an opportunity to propose an alternative placement or appeal the pendency-placement order. We have already addressed the latter points, and have found no merit to them.

As to what was required in V.P.'s pleading, we note that "the remedies a federal court may bring to bear are not constrained by a litigant's prayer for relief; rather, the Federal Rules of Civil Procedure command the federal courts to grant relief that complainants do not demand when such relief is appropriate." *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 448 (5th Cir. 2002); *see also Kirchberg v. Feenstra*, 708 F.2d 991, 1000 (5th Cir. 1983) ("Rule 54(c) of the Federal Rules

of Civil Procedure provides that a judgement shall grant the relief to which a party in whose favor it is rendered is entitled, even *if the party has not demanded this relief in his pleadings*." (emphasis in original!)). The district court apparently determined that a request for a second year's reimbursement did not concern the nature of relief, but was a claim of a separate injury. Some decisions under the IDEA have held that general prayers for relief are insufficient to raise claims for reimbursement of school expenses that were not explicitly made. The magistrate judge cited some of these decisions in denying recovery of the second school year's expenses. *E.g., Lillbask v. Conn. Dep't of Educ.*, 397 F.3d 77, 90 (2d Cir. 2005).

We do not decide whether reimbursement for a second year is a new claim or whether it is additional relief on the existing claim. We turn instead to the effect of the magistrate judge's statements at one hearing, and HISD's responses.

Regardless of whether a claim for a second year should have been the subject of amended pleadings, V.P. argues that the magistrate judge's ruling on the motion to supplement the record indicated the question of reimbursement for a second year was tied to the not-yet-made decision on whether to affirm the Texas Education Agency's decision that the Parish School was the proper placement. As we have discussed, the magistrate judge on August 9, 2006, stated that if the decision as to the Parish School placement "goes your way, . . . we'll consider" the bills for the second year. The judge did not see a reason for the parents to "keep amending to put the school bills" into the record as they were received. Instead, "we'll cross that bridge when it comes to it."

Even more pointedly, the judge then stated that if the hearing officer's decision "is implemented, HISD is going to have to pay those bills, right?" HISD's attorney immediately indicated that he did not "necessarily agree to that," but that in terms of the court's time, "it makes more sense for you to rule on the motion for summary judgment [and hold that HISD provided an appropriate education,] because if you rule for me, those issues will be moot." The magistrate judge agreed.

At that point, the magistrate judge was finding that the only predicate for reimbursement of appropriate expenses from the second year was that the administrative decision be affirmed. This ruling in no manner suggested that another predicate was an amendment to the answer and counterclaim.

An order was entered on August 9, 2006, reflecting the rulings made at the hearing. It stated only this:

> Arguments heard on the record. Docket Entries Nos. 16, 21, and 28 are granted. Docket Entry No. 20, 26, and 34 are granted in part and denied in part as stated on the record.

Docket Entry 20 was V.P.'s request to submit an affidavit from a new expert and cost bills for attending the Parish School during the pendency of the appeal. To grant and deny that motion "as stated on the record," was a decision that the expert's affidavit would be admitted, and that the bills for the second year would not be at that time. We also interpret the order, though, to mean that the bills would likely be admissible if the hearing officer's decision was upheld.

So as of August 9, 2006, V.P. had reason to proceed on the basis that appropriate expenses for the 2005-2006 school year would be reimbursed if the hearing officer's decision was affirmed. There was no suggestion from the magistrate judge that any amendment to the pleadings was needed.

Subsequent steps were taken that were consistent with this understanding. On March 22, 2007, the district court approved the magistrate judge's recommendation that the Parish School was the appropriate placement. In the same set of findings, the magistrate judge decided that there was not enough evidence in the record to determine whether all of the submitted costs for the private school should be reimbursed. Because V.P. had not moved for summary judgment on reimbursement during the pendency of the review, the issue was explicitly left for another time.

On the same date that the district court sustained the earlier magistrate judge's recommendation, the magistrate judge entered a new order as to reimbursement. The fact that V.P. had requested additional compensation for the continued placement during the appeal was noted. No suggestion of any pleading defect was indicated, and instead this was stated:

> In order for the court to determine the proper amount of relief, the court must determine whether other, more suitable substitute placements existed, whether the parents expended sufficient effort in securing an alternative placement, whether the school district cooperated with the parents on the

> child's placement, and whether the parents are entitled to reimbursement for the period of appeal. *Cf. Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1161 (5th Cir. 1986) (listing factors to consider in determining whether parents are entitled to full reimbursement for the cost of private school enrollment). The court has determined that the record must be developed further, as to both facts and law, before the court can exercise its discretion in determining the amount to be awarded.

The *Alamo Heights* precedent concerned whether the costs of a program should be reimbursed, even if the program was not *necessitated* by the IDEA:

> Factors that the court may consider in determining whether full or partial reimbursement is in order would include the existence of other, perhaps more suitable, substitute placements, the effort expended by Mrs. G. in securing alternative placements, and the general cooperative or uncooperative position of the School District itself.

Alamo Heights, 790 F.2d at 1161. Here, the appropriateness of the Parish School placement had been resolved, but specific items of costs could have been subject to disagreement. The parties were ordered to attempt reaching an agreement on the reimbursement amount. Absent agreement, an evidentiary hearing would be held.

By July 20, 2007, the parties had agreed that $16,125.30 was the appropriate amount of

reimbursement for 2004-2005, and if reimbursement were found appropriate, also for 2005-2006. HISD, in a motion filed on that date, argued that V.P.'s failure ever to amend her pleadings to request reimbursement for a second year barred its consideration. In a response, V.P. argued that HISD's position was inconsistent with what had been known at least since the June 20, 2006 motion to supplement the record, namely, that reimbursement for the second year was being sought. V.P. argued that HISD had introduced a new objection by alleging an absence of pleadings. The original objection to the motion to supplement back on June 20, 2006, was that V.P. needed to go through the administrative process again for the second year, and that the appeal of the validity of the hearing officer's decision in no way affected the payment of costs for another year. As we have discussed above, neither of those defenses was valid. Because of *Burlington* and the federal regulations, the hearing officer's decision made the Parish School the agreed proper placement during the pendency of the appeal. The appeal was very much the place in which these issues could be resolved, not a second administrative proceeding.

The district court found that payment for the 2005-2006 Parish School costs could be awarded under authority to "grant such relief as the court determines is appropriate. . . ." 20 U.S.C. § 1415(i)(2)(C)(iii). The court declined to do so, even saying that it could not do so, because of V.P.'s failure adequately and timely to raise the pendency placement issue. We disagree with that ruling. Because HISD was on notice no later than the August 9, 2006 hearing that V.P.'s request for reimbursement of the second year might well rise or fall on whether the hearing officer's decision was

upheld, a linkage made by the magistrate judge in the oral ruling, there was no fatal flaw in the pleadings. In effect, there was a ruling as of August 2006 that ignored any issue of pleadings and made the subsequent viability of the claim dependent on other factors.

We do not overlook that more clarity could have been given to this point by both the magistrate judge and by V.P.'s attorney. We have had to piece together statements from the hearing and in the brief written order. Yet those shortcomings are far less significant than the denial of the claim in the face of these facts: (1) clear indications by the magistrate judge in August 2006 when the issue was first addressed that the only question was whether the administrative decision was ultimately affirmed, (2) HISD's knowledge at least since August 2006 that reimbursement for a second year was being sought, and (3) under the regulations and *Burlington*, HISD could not avoid responsibility for the pendency placement if the hearing officer's decision was affirmed.

By the time of the magistrate judge's decision on September 11, 2007, that same judge no longer saw the issue as she had thirteen months earlier. Certainly, any interim order may be altered at any time before final judgment. Fed. R. Civ. P. 54(b). We find it to have been an abuse of discretion, though, to reverse the earlier course on the issue of pleadings. HISD had for that entire time been fully aware of V.P.'s pursuit of the second year's reimbursement, even if it would not relinquish its disagreement with the magistrate judge's earlier indications that costs of a second year depended strictly on affirming the propriety of the first year.

There was no lack of notice to HISD. By operation of the precedents and federal regulations, HISD had notice of a legal obligation. By operation of the understandings arising from the August 9, 2006 hearing, there was notice that V.P. was seeking reimbursement for a second year and payment was dependent on the Texas Education Agency hearing officer's decision being affirmed.

The parties stipulated that if reimbursement for a second year became due, the proper amount would be $16,125.30. We reverse the refusal to award reimbursement for the second year at the Parish School and render judgment for the amount agreed to by the parties.

C. Interests, Attorney's Fees, and Costs

In the conclusion of her briefs on appeal, V.P. summarily asserts that the district court improperly denied an award of attorney's fees and related costs for her attorney's work on the pendency reimbursement issue. V.P. further requests that the court award interest on the reimbursement for the 2004-2005 and 2005-2006 Parish School costs from the date of the first payment made by V.P.'s parents and award "all attorney's fees and related costs without reduction for all work done in this matter including this appeal." Finally, V.P. asks for "the application of a multiplier of three times the amount due on the reimbursement and the attorneys fees and related costs, due to the extended time caused by the vexatious appeals of HISD, and the . . . impact that this extended litigation has had on the family and V.P." HISD provides little response to V.P.'s requests, simply stating that the court should reverse the award of attorney's fees with

respect to the 2004-2005 school year because it provided V.P. with a free appropriate public education and should deny V.P. attorney's fees and related costs for the 2005-2006 school year.

In its final judgment in this case, the district court awarded V.P. her costs. Additionally, the magistrate judge granted in part V.P.'s post-judgment supplemental bill of costs and application for attorney's fees. Denied were fees for the portion of her attorney's time spent working on the 2005-2006 pendency reimbursement issue. The denial was based on the conclusion that V.P. was not a prevailing party with respect to that claim.

The parties only briefly reference the attorney's fees awarded to V.P. for work on the 2004-2005 school year issues. The magistrate judge awarded such fees after both the final judgment and the notices of appeal were entered in this case. We find that this award is not presently before the court

With respect to costs and attorney's fees for work associated with the 2005-2006 school year, the magistrate judge did not award V.P. any attorney's fees due to its conclusion that she was not a prevailing party on this claim. Because we reverse and render the district court's judgment regarding reimbursement for the 2005-2006 placement, we remand to the district court V.P.'s request for attorney's fees and costs regarding this issue.

III. CONCLUSION

The judgment of the district court is AFFIRMED as to the 2004-2005 school year, but REVERSED and

RENDERED as to a payment of $16,125.30 for the 2005-2006 school year. V.P.'s request for attorney's fees and costs associated with the 2005-2006 reimbursement claim is REMANDED to the district court. We express no opinion about the attorney's fees that were awarded below, as issues regarding them have not been properly presented in this appeal.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20817

D.C. Docket No. 4:05-CV-1686

[Filed September 9, 2009]

HOUSTON INDEPENDENT SCHOOL DISTRICT,)
)
Plaintiff - Appellee Cross-Appellant)
)
v.)
)
VP, by next friend Juan and Sylvia P,)
)
Defendant - Appellant Cross-Appellee)

Appeals from the United States District Court for the Southern District of Texas, Houston

Before BENAVIDES, SOUTHWICK, and HAYNES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed as to the 2004-2005 school year, but reversed and rendered as to a payment of $16,125.30 for the 2005-2206 school year. V.P.'s

request for attorney's fee and costs associated with the 2005-2006 reimbursement claim is remanded to the District Court for further proceedings in accordance with the opinion of this Court. This court express no opinion about the attorney's fees that were awarded below, as issues regarding them have not been properly presented in this appeal.

IT IS FURTHER ORDERED that plaintiff-appellee-cross-appellant pay to defendant-appellant-cross-appellee the costs on appeal to be taxed by the Clerk of this Clerk.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION H-05-1686

[Filed October 4, 2007]

HOUSTON INDEPENDENT SCHOOL DISTRICT,	)
	)
Plaintiff,	)
	)
v.	)
	)
V.P. B/N/F JUAN AND SYLVIA P.,	)
	)
Defendants.	)
	)

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

The court, having reviewed the Magistrate Judge's Memorandum and Recommendation (Dkt. 76 and the objections filed thereto (Dkt. 77), is of the opinion that the Memorandum and Recommendation should be adopted by this Court.

It is, therefore, ORDERED that the Magistrate Judge's Memorandum and Recommendation is ADOPTED by this Court. Plaintiff's motion for partial

summary judgment (Dkt. 70) is GRANTED. Defendant's motion for summary judgment (Dkt. 71) is DENIED.

Signed at Houston, Texas on October 4, 2007.

/s/

Gray H. Miller
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION H-05-1686

[Filed October 4, 2007]

HOUSTON INDEPENDENT SCHOOL DISTRICT, *Plaintiff*,	)
v.	)
V.P. B/N/F JUAN AND SYLVIA P., *Defendants*.	)

FINAL JUDGMENT

In accordance with the Magistrate Judge's Memorandum and Recommendation (Dkt. 58) and the Order Adopting the Memorandum and Recommendation (Dkt. 61), it is

ORDERED that the Hearing Officer's decision placing V.P. at the Parish School was an appropriate placement for the 2004-2005 school year. It is further

ORDERED that V.P. is entitled to reimbursement for the Parish School's tuition in the amount of $16,125.30.

In accordance with the Magistrate Judge's Memorandum and Recommendation (Dkt. 76) and the Order Adopting the Memorandum and Recommendation signed on October 4, 2007, it is

ORDERED that V.P. is not entitled to tuition reimbursement for the 2005-2006 school year.

All relief not expressly granted is DENIED.

Costs are assessed against the plaintiff.

This is a FINAL JUDGMENT.

Signed at Houston, Texas on October 4, 2007.

/s/

Gray H. Miller
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-05-1686

[Filed September 11, 2007]

HOUSTON INDEPENDENT SCHOOL DISTRICT,	)
Plaintiff,	)
v.	)
V.P. b/n/f JUAN and SYLVIA P.,	)
Defendant.	)

MEMORANDUM AND RECOMMENDATION

Pending before the court[1] is Plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 70), Defendant's Motion for Summary Judgment (Docket

[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. Docket Entry No. 47.

Entry No. 71), and the responses filed thereto. The court has considered the motions, all relevant filings, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that Plaintiff's Motion for Partial Summary Judgment be **GRANTED** and Defendant's Motion for Summary Judgment be **DENIED**.

I. Case Background

The issue before the court arises from an appeal of the decision of a special education hearing officer in a Texas Education Agency proceeding filed under the Individuals with Disabilities Education Act ("IDEA").[2]

A. Underlying Facts

Defendant V.P. ("Defendant") qualified for special education services in 2001 as a six-year-old kindergarten student at Wainwright Elementary School.[3] Upon Defendant's qualification, an Admission, Review, and Dismissal ("ARD") Committee began holding annual meetings in order to prepare an individualized education program ("IEP"), which is a written statement of a disabled child's present level of academic achievement, measurable annual educational goals, and special education, related services, and other accommodations to be provided. See 20 U.S.C. § 1414(d)(1)(B); Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808 (5th Cir. 2003).

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[2] 20 U.S.C. §§ 1400-1482.

[3] See Administrative Record, Docket Entry No. 13, vol. IV, p. 978.

At ARD meetings in May of 2004, Defendant's mother withheld consent to the ARD-approved IEP for the upcoming school year. Defendant's mother indicated that she was dissatisfied with her daughter's progress and that her daughter required more intensive services. Defendant's parents subsequently withdrew Defendant from Wainwright Elementary and enrolled her in a private school, the Parish School, which is designed for children with different language-based learning disabilities. She began attending the Parish School in September of 2004.[4]

In August of 2004, Defendant filed a Request for Special Education Due Process Hearing and Required Notice with the Texas Education Agency.[5] A hearing officer issued a decision on February 10, 2005, finding Houston Independent School District ("Plaintiff") had failed to provide Defendant a Free and Appropriate Public Education ("FAPE"), to develop IEPs reasonably calculated to provide educational benefits to Defendant, and to consider an appropriate placement for Defendant.[6] The hearing officer also considered whether Defendant's parents were entitled reimbursement for Defendant's placement at the Parish School.[7] The officer concluded that the parents had complied with the procedural conditions precedent

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[4] See id., vol. IIC, at p. 572.

[5] See id., vol. I, at pp. 163-69.

[6] See Plaintiff's Original Complaint ("Complaint"), Docket Entry No. 1, Ex. A, Final Decision of the Hearing Officer, p. 2 (unnumbered).

[7] See id. at p. 20.

and that the Parish School is an appropriate placement for Defendant.[8] Defendant was awarded reimbursement for enrollment at the Parish School "during the 2004-05 school year."[9]

B. Procedural History

Plaintiff filed its Complaint against Defendant on May 10, 2005, seeking to overturn the hearing officer's decision.[10] In Defendant's Answer and Counterclaim, filed June 9, 2005, she requested the court uphold the portion of the hearing officer's decision in her favor and award attorney's fees, related costs, and "other and further relief to which she is entitled."[11] In her Counterclaim, Defendant requested the court "enter a judgment that the portion of the hearing officer's conclusion that [Plaintiff] provided [Defendant] with FAPE . . . was contrary to the facts and the law" and award "monetary and compensatory relief as the Court determines is appropriate."[12] After the amended pleadings deadline had passed,[13] Defendant filed

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[8] See id.

[9] See id.

[10] See Complaint, Docket No. 1, p. 2.

[11] Defendant's Original Answer & Counterclaim ("Answer & Counterclaim"), Docket Entry No. 5, p. 5.

[12] Id. at p. 14.

[13] See Scheduling Order, Docket Entry No. 8, p. 1. Amended pleading deadline was set as October 8, 2005.

several motions to submit additional evidence.[14] In each motion, Defendant indicated, inter alia, that she had incurred additional educational costs at the Parish School since the decision of the administrative hearing officer and she offered to submit such costs for reimbursement.[15]

In a motion hearing held on August 9, 2006, the court indicated that, prior to the case decision, it would consider reimbursement for the 2004-2005 school year, but not those expenses incurred following the hearing officer's order.[16] The court explained that Defendant's request for reimbursement for the 2005- 2006 school year (the period following the hearing officer's decision) constituted a new claim for relief.[17]

Plaintiff filed a Motion for Summary Judgment on June 23, 2006, requesting the decision of the administrative hearing officer be overturned and Defendant's counterclaims be dismissed.[18] On March 2, 2007, this court issued a Memorandum and

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[14] See Defendant's Motion to Submit Additional Evidence, Docket Entry No. 20, pp. 1-2; Defendant's Amended Motion to Submit Additional Evidence, Docket Entry No. 26, pp. 1-2; Defendant's Supplemental Motion to Submit Additional Evidence ("Supplemental Motion"), Docket Entry No. 34, pp. 2-3.

[15] See id.

[16] See Minute Entry Order dated August 9, 2005, Docket Entry No. 53; Hearing on August 9, 2005.

[17] See id.

[18] See Plaintiff's Motion for Summary Judgment, Docket Entry No. 29, pp. 38-39.

Recommendation ("M&R") affirming the hearing officer's decision in all respects, including a finding that Defendant was entitled to reimbursement of the costs associated with private school placement during the 2004- 2005 school year.[19] This court refrained from addressing the matter of reimbursement for the costs of the Parish School during the pendency of review, as well as the extent of reimbursement.[20] The court adopted the M&R and ordered parties to engage in settlement discussions regarding the amount of reimbursement.[21] The parties were unable to reach an agreement and an evidentiary hearing was held on June 20, 2007.[22] Both parties stipulated the amount of reimbursement for the 2004-2005 school year was $16,125.30, and, if it was ultimately determined that Defendant was entitled to reimbursement for the 2005-2006 school year, the reimbursement for that year was also stipulated to be $16,125.30.[23] The parties were ordered to file cross-motions on Defendant's entitlement to such reimbursement.[24] Accordingly, the primary issue now before the court is whether

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[19] See Memorandum and Recommendation, Docket Entry No. 58, p. 41.

[20] See id.

[21] See Order Adopting Magistrate Judge's Memorandum and Opinion, Docket Entry No. 61; Order dated March 22, 2007, Docket Entry No. 62, p. 2.

[22] See Minute Entry Order dated June 20, 2007, Docket Entry No. 69; Hearing on June 20, 2007.

[23] Id.

[24] Id.

Defendant is entitled to reimbursement for attendance costs at the Parish School for the 2005-2006 school year.

II. Analysis

In general, summary judgment is appropriate when evidence reveals that no genuine dispute exists regarding any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Brown v. City of Houston, 337 F.3d 539, 540-41 (5th Cir. 2003). When considering the evidence, "[d]oubts are to be resolved in favor of the nonmoving party, and any reasonable inferences are to be drawn in favor of that party." Evans v. City of Houston, 246 F.3d 344, 348 (5th Cir. 2001); see also Boston Old Colony Ins. Co. v. Tiner Assocs. Inc., 288 F.3d 222, 227 (5th Cir. 2002).

This case does not directly fall under the general summary judgment standard, as the issues before the court are solely those of law. There is no factual dispute. Furthermore, this case does not directly fall under the unique standard of review under IDEA, because the court is no longer reviewing the hearing

officer's decision.[25] Thus, the court is not following a "virtually de novo" standard of review.

Plaintiff moves for partial summary judgment denying Defendant's request for reimbursement for 2005-2006 private school expenses. The basis of the motion is Defendant's failure to properly demand relief as required under Fed. R. Civ. P. 8(a)(2). Plaintiff asserts that Defendant's use of boilerplate language and failure to amend pleadings did not put Plaintiff on notice that Defendant would be seeking reimbursement.

In Defendant's Motion for Summary Judgment, Defendant asks the court to award all costs, including transportation and pre- and post-judgment interest, associated with Defendant's placement at the Parish School from the date of enrollment until a final order

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[25] The IDEA directs courts, when reviewing a state hearing officer's decision, to receive the records of the administrative proceedings, to hear additional evidence at the request of a party, and to grant appropriate relief based on a preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(c). The court must accord due weight to the hearing officer's findings, but also must review the evidence and must "reach an independent decision based on a preponderance of the evidence." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347 (5th Cir. 2000)(quoting Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 252 (5th Cir. 1997)); see also Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808 (5th Cir. 2003). The Fifth Circuit refers to the district court's standard of review as "virtually de novo." Adam J. ex rel. Robert J., 328 F.3d at 808; Bobby R., 200 F.3d at 347.

is entered by the court.[26] Defendant contends that, pursuant to 20 U.S.C. § 1415(j), and regardless of any failure to particularly state a claim, Defendant's placement at the Parish School is the "pendency" or "stay put" placement and Defendant is entitled to an automatic injunction providing tuition reimbursement during appeal and until such time as Plaintiff offers an appropriate program. Defendant also claims that it is within the court's discretion to award "appropriate" reimbursement.

A. Pleading Requirements

The general rules of pleading require that a pleading which sets forth a claim for relief "contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a)(2). A complaint must provide "fair notice" of the nature of a claim, as well as the "grounds" upon which the claim rests. See Bell Atlantic Corp. v. Twombly, — U.S. —, 127 S.Ct. 1955, 1965 (2007). A pleading that contains only a "bare bones" allegation that a wrong occurred and does not plead any of the facts giving rise to the injury, does not provide adequate notice. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164 (5th Cir. 1999).

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[26] In Defendant's Motion for Summary Judgment, Defendant argues at length that the hearing officer's determination that Defendant was denied a FAPE should be affirmed by this court. The court has already issued a decision on the hearing officer's order and disregards Defendant's arguments on this matter as moot.

The Supreme Court has cautioned that a claim "extracted late in the day" from a "general prayer for relief and asserted solely to avoid otherwise certain mootness" calls for "close inspection." Arizonans for Official English v. Arizona, 520 U.S. 43, 71 (1997). In the context of an IDEA reimbursement claim, other circuits have found the use of boilerplate language insufficient to read such a claim into a complaint. See Lesesne ex rel. B.F. v. District of Columbia, 447 F.3d 828, 833 (D.C. Cir. 2006) (reasoning that a boilerplate request for "any other relief the Court deems just" did not entitle a party to add additional claims in an attempt to defeat a mootness defense); Brown v. Bartholomew Consol. Sch. Corp., 442 F.3d 588, 598 (7th Cir. 2006) (declining to infer a request for reimbursement when the complaint contained no specific mention of such); Lillbask v. Connecticut Dep't of Educ., 397 F.3d 77, 90 (2d Cir. 2005) (finding a general request for "other such relief as the Court deems appropriate" insufficient to constitute a claim for compensatory educational services which were not specifically requested in the complaint); Thomas R.W. v. Massachusetts Dep't of Educ., 130 F.3d 477, 480 (1st Cir. 1997) (finding a general prayer for "such relief as this court deems just and proper" did not preserve a request for damages and avoid mootness on a claim for reimbursement). Courts have also considered the presence of language requesting IDEA-related reimbursement in subsequent motions and, likewise, found such late mention insufficient to constitute a claim for relief. See Brown, 442 F.3d at 598; Lillbask, 397 F.3d at 90.

There is no dispute that Defendant did not explicitly request tuition reimbursement for the 2005-2006 school year in her Answer and Counterclaim. In

such pleadings, Defendant refers to the hearing officer's administrative order, but that order was confined solely to reimbursement for the 2004-2005 school year.[27] There was no mention of continuing educational expenses or tuition reimbursement for 2005-2006.

Defendant alleges that her use of boilerplate language ("such other and further relief to which she is entitled;"[28] "additional monetary and compensatory relief as the Court determines is appropriate"[29]) constitutes a claim for reimbursement for 2005-2006. However, as cautioned by the Court in Arizonans, a general prayer for relief calls for close inspection. 520 U.S. at 71. Defendant's general claim contains boilerplate language equivalent to that which courts have found, when alone, to be insufficient to preserve a claim for compensatory educational services.

Plaintiff highlights the fact that Defendant had ample opportunity to amend her pleadings to include a claim for tuition reimbursement for 2005-2006. In a motion hearing on August 9, 2006, the court specifically indicated to Defendant that her request for reimbursement for the 2005-2006 school year constituted a new claim for relief.[30] Regardless,

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[27] See Complaint, Docket Entry No. 1, Ex. A, Final Decision of Hearing Officer, p. 2 (unnumbered).

[28] Answer & Counterclaim, Docket Entry No. 5, p.5.

[29] Id. at p. 14.

[30] See Minute Entry Order dated August 9, 2005, Docket Entry No. 53; Hearing on August 9, 2005.

Defendant still failed to file any motion requesting leave of court or consent of Plaintiff to amend the pleadings. See Lillbask, 397 F.3d at 90-91 (considering the failure to amend pleadings when dismissing a compensatory educational services claim as moot).

Plaintiff filed subsequent motions to submit additional evidence, but such motions do not, by themselves, establish an additional claim for relief. Id. at 90. Defendant's late mention of additional and ongoing education costs at the Parish School[31] does not properly meet the requisite timing and form necessary to put Plaintiff on notice of the 2005-2006 reimbursement claim. See Brown, 442 F.3d at 598.

Accordingly, the court finds that the pleadings were insufficient to put Plaintiff on notice that Defendant was seeking reimbursement for the 2005-2006 school year at the Parish School.

B. Court's Discretion to Award "Appropriate Relief"

Alternatively, Defendant claims she is entitled to 2005-2006 tuition expenses pursuant to the court's broad discretion to award "appropriate" reimbursement.

IDEA provides for judicial review of an administrative due process hearing and grants the reviewing court the authority to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). The Supreme Court has determined that

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[31] See Supplemental Motion, Docket Entry No. 34, p. 2-3.

the Act authorizes courts to order school authorities to retroactively reimburse parents for private education expenses if that court ultimately decides that private placement, and not a proposed IEP, is appropriate under the Act. See Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985). Burlington further suggests that, in such a case, "appropriate relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." Id. at 370 (internal quotation omitted).

The court acknowledges that it holds discretion to award reimbursement, but Defendant has failed to persuade the court to exercise that discretion in this case. The discretion of the court is broad, but not limitless. It does not grant the court the power to ignore the Federal Rules of Civil Procedure. The court will not impute notice on Plaintiff when Defendant has not followed the pleading guidelines.

C. "Stay Put" Provisions

Finally, the court addresses Defendant's argument that she is entitled to reimbursement for the 2005-2006 school year based upon the "stay put" provision of IDEA. The "stay put" provision states in pertinent part: "During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement . . . ." 20 U.S.C. § 1415(j).

The Fifth Circuit has indicated that a stay put order is a collateral order and that resolution of stay put issues are completely separate from merits issues

focusing on the adequacy of a proposed IEP. See St. Tammany Parish Sch. Bd. v. Louisiana, 142 F.3d 776, 781-82 (5th Cir. 1998).

Pendency placement is not at issue in this case because Defendant's placement did not change during the course of these court proceedings. This case concerned whether Plaintiff provided Defendant with a FAPE, whether IEPs were reasonably calculated to provide educational benefits to Defendant, and whether the Parish School was an appropriate placement for Defendant for the 2004-2005 school year. The maintenance of Defendant at her current educational placement for future years was not directly questioned or raised at the administrative level.

The court has acknowledged its discretion to award appropriate relief to parents with IDEA claims, including retroactive reimbursement of educational costs. St. Tammany suggests that such discretion may also be exercised when considering costs pending a merits decision. 142 F.3d 782-83. A school district *may* be held responsible for maintaining a certain placement during the pendency of court proceedings. However, as noted previously, discretion is not unlimited. This court will not disregard Defendant's failure to properly and timely raise any pendency placement reimbursement issues during the course of litigation.

The court concludes that Defendant is not entitled to reimbursement for 2005-2006 school expenses under the stay put provisions of IDEA. In consideration of the court's disposition, Defendant is not entitled to attorney's fees or pre- and post-judgment interest for

the 2005-2006 school year, as she was not a prevailing party. See 20 U.S.C. § 1415(i)(3)(B)(i).

III. Conclusion

Based on the foregoing, the court **RECOMMENDS** that Plaintiff's motion for partial summary judgment be **GRANTED** and Defendant's motion for summary judgment be **DENIED**.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have ten days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, either electronically or by mail to P.O. Box 61010, Houston, Texas, 77208. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 11th day of September, 2007.

/s/
Nancy K. Johnson
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION H-05-1686

[Filed March 22, 2007]

HOUSTON INDEPENDENT SCHOOL DISTRICT,	)
	)
Plaintiff,	)
	)
v.	)
	)
V.P. B/N/F JUAN AND SYLVIA P.,	)
	)
Defendants.	)
	)

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND OPINION

Having reviewed the Magistrate Judge's Memorandum and Recommendation and the objections thereto, the court is of the opinion that both parties' objections should be OVERRULED.

It is, therefore, ORDERED that the Memorandum and Recommendation is hereby ADOPTED by this court. The decision of the Hearing Officer is affirmed with respect to the determinations on Plaintiff's

procedural and substantive compliance with the Individuals with Disabilities Education Act. Issues related to reimbursement will be addressed under the direction of the Magistrate Judge. Therefore, Plaintiff's motion for summary judgment (Dkt. 29) is GRANTED IN PART and DENIED IN PART.

Signed at Houston, Texas on March 22, 2007.

/s/

Gray H. Miller
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-05-1686

[Filed March 2, 2007]

HOUSTON INDEPENDENT SCHOOL DISTRICT,)
)
Plaintiff,)
)
v.)
)
VP by next friend, Juan and Sylvia P,)
)
Defendant.)
)

MEMORANDUM AND RECOMMENDATION

Pending before the court[1] is Plaintiff's Motion for Summary Judgment (Docket Entry No. 29). The court has considered the motion, all relevant filings, and the applicable law. For the reasons set forth below, the

[1] This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. Docket Entry No. 47.

court **RECOMMENDS** that Plaintiff's motion be **GRANTED IN PART AND DENIED IN PART.**

I. Case Background

This is an appeal of the decision of a special education hearing officer in a Texas Education Agency proceeding filed under the Individuals with Disabilities Education Act ("IDEA").[2]

A. Assessments, Placement, and Implementation

Defendant V.P. ("Defendant" or "V.P.") first qualified for special education services in 2001 under the category of "speech impairment" due to "a severe deficit in receptive/expressive language."[3] In April 2003, V.P. received hearing aids and, thereafter, also qualified for special services under the category of "auditory impairment" due to "mod[erate]-to-severe sensorineural hearing loss in [both] ear[s]."[4] In May 2003, V.P. was in her second semester of kindergarten at Wainwright Elementary School.[5] She was six years old.[6] V.P. began first grade in the fall of 2003.[7]

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[2] 20 U.S.C. §§ 1400-1482.

[3] Administrative Record, Docket Entry No. 13, ("A.R."), vol. IV, p. 855; see also id. at 852, 917, 943.

[4] Id. at p. 979; see also id. at pp. 873, 898, 978.

[5] See id. at p. 978.

[6] See id.

[7] See id. at p. 1001.

In August 2003, V.P. began using an FM system, which amplified the teacher's voice through V.P.'s hearing aids.[8] Debra Harris ("Harris") was the school nurse at Wainwright Elementary beginning in the 2003-04 school year.[9] She oversaw V.P.'s use of the system and provided training to school staff, but had no regular consultation with an audiologist.[10] Harris testified that, when she picked up the FM system to be used by V.P. from T. H. Rogers Elementary, she received brief instruction and witnessed a demonstration on its use.[11] When she returned to Wainwright Elementary, she provided V.P.'s general education teacher with the system, some printed material about the system, and instructions.[12]

V.P. used the system successfully until another student damaged the loop component[13] sometime in mid to late September.[14] Harris returned the loop component to T. H. Rogers Elementary via interoffice

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[8] See id. at vol. IIB, pp. 407-08.

[9] Id. at p. 407.

[10] See id. at pp. 407-08, 412, 420-21.

[11] Id. at p. 408.

[12] See id.

[13] The loop component transmitted the sound of the teacher's voice directly through V.P.'s hearing aids. See id. at vol. IIA, pp. 154-55.

[14] See id. at vol IIB, p. 460; but see id. at p. 409 (stating that the nurse did not have the exact date, but recalled that the system was damaged in mid to late October).

mail.[15] While the loop was unavailable, V.P. used headphones with the system, but experienced some difficulty understanding proper use of the headphones.[16] In fact, on October 7, 2003, the itinerant teacher for hearing-impaired students, Reba Powell-Ivory ("Ivory"), noticed that V.P. was wearing the headphones over her hearing aids, which was an incorrect usage.[17] Although Harris did not have the exact dates of when the system was damaged and replaced, she estimated that the loop component was out of service for about three to four weeks.[18] V.P.'s mother recalled that the loop component was out of commission until November 21, 2003.[19]

On a few other occasions, school staff questioned the functionality of the system.[20] During the fall, V.P. used the headphones in the place of the loop on at least two other occasions, once when she lost her hearing

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[15] See id. at p. 410.

[16] See id. at pp. 410-11, 414.

[17] See id. at pp. 411, 463-64; vol. IIIB, p. 513. Patricia Moncada ("Moncada"), an audiologist who treated V.P. beginning in January 2003, expressed concern at the hearing about the use of a headset with hearing aids. Id. at vol. IIA, pp. 139, 142, 155. She testified that usage of the headphones over the hearing aids could cause a myriad of problems, including feedback or whistling from the hearing aids and sound leakage around the hearing aid microphones. See id. at p. 155.

[18] See id. at vol. IIB, pp. 409, 412, 418.

[19] Id. at p. 460.

[20] See id. at pp. 420-21.

aids and once when she had an infection behind her right ear that prevented her from wearing her hearing aids.[21]

An annual Admission, Review, and Dismissal ("ARD") Committee[22] meeting convened on October 7, 2003, to review V.P.'s progress and to develop an educational program for first grade.[23] V.P.'s parents, the school principal, V.P.'s general education teacher, the special education chair, an itinerant teacher for hearing impaired students, a speech therapist, and an language proficiency assessment committee ("LPAC") representative attended the meeting.[24] The minutes from the meeting reflect the mother's concern that V.P. cried when working on homework because she did not

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[21] See id. at p. 419; vol. IIA, pp. 104-05.

[22] In Texas, the ARD Committee is charged with preparing a student's individualized education program ("IEP"), which is a written statement of the disabled child's present level of academic achievement, measurable annual educational goals, and special education, related services, and other accommodations to be provided to the child. The ARD Committee is composed of the disabled child's parent(s), at least one special education teacher and/or one regular education teacher, a representative of the school district, someone who can provide insight into the instructional implications of the child's clinical evaluation, and, when appropriate, other individuals with special knowledge or expertise related to the child and the child herself. See 20 U.S.C. § 1414 (d)(1)(B); Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808 (5th Cir. 2003).

[23] See A.R., vol. IV, pp. 1001, 1014.

[24] See id at p. 1019.

understand the directions.[25] V.P.'s mother also informed the committee that the parents had hired a private tutor and a private speech/language provider to work with V.P. after school.[26] V.P.'s general education teacher, Karen Williams ("Williams"), reported that she could not understand V.P.'s speech, sometimes even after several attempts.[27] V.P.'s speech therapist, Yvonne Frankiewicz ("Frankiewicz"), reported that V.P. had made progress in speech, including improved intelligibility.[28] The minutes indicate that V.P. followed the school rules and did not need any behavior intervention.[29]

The committee discussed the oral deaf program at Sutton Elementary as a possible placement for V.P., but decided, instead, to implement the following additional modifications at Wainwright Elementary for a thirty-day trial period: frequent breaks, content mastery, one-on-one instruction for every subject, and in-class support for reading, language or math.[30] According to the notes, the committee also recommended academic and audiological testing.[31] The program plan to assist V.P. with speech included one

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[25] Id. at p. 1014.

[26] See id. at p. 1016.

[27] See id. at p. 1014.

[28] See id. at p. 1018.

[29] Id. at p. 1017.

[30] See id. at pp. 1003, 1015-16.

[31] Id. at p. 1016, 1017.

and one-half hours of group speech therapy per week and thirty minutes of individual speech therapy once per week.[32]

For auditory amplification, the committee noted that V.P. wore hearing aids and, when in the classroom, used the FM system.[33] Ivory reported that she had given each of V.P.'s teachers a copy of "Tips for Working with Hearing Impaired Students," a one-page flyer that identifies about a dozen strategies that assist hearing-impaired children learn in the classroom.[34] Despite V.P.'s qualification as hearing impaired and her mother's request for intensive language service, the committee did not propose deaf education with Plaintiff's itinerant teacher for hearing-impaired students.[35]

Also in October, V.P. was working with Amy Powell ("Powell"), special education chair, on content mastery, when Powell raised her voice toward V.P. in frustration.[36] V.P. began to cry, and Powell stopped the

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[32] See id. at p. 1018.

[33] See id. at p. 1017.

[34] See id. at pp. 1017, 1156.

[35] See id. at pp. 1001, 1003, 1015.

[36] See id. at vol. IIA, pp. 238-42; but see id. at vol. IIC, p. 579 (providing Powell's testimony that V.P. refused to work and started crying when Powell threatened to tell V.P.'s mother that she was not working).

session.[37] After the incident, V.P.'s mother met with Powell, a special education coordinator, the school counselor, and a school psychologist to process the incident.[38] Powell reported that the primary technique she used with V.P. was to read her the material.[39] The special education coordinator explained that other teaching techniques were more effective with hearing-impaired students.[40] Although Powell had attended the most recent ARD committee meeting, at which Ivory indicated that she had provided a tips handout on how to work with hearing-impaired students, Powell said that she had not seen the handout and was not employing the suggested techniques.[41] The group decided to give V.P. a couple of weeks off from content mastery.[42] A "couple of weeks" turned into the remainder of the fall semester.[43] Additionally, a teacher's aide who had been assisting V.P. in class

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[37] See id. at vol. IIA, p. 239; but see id. at vol. IIC, pp. 579-80 (providing Powell's testimony that she allowed V.P. a few minutes to calm down before completing the content mastery session, during which remaining time, V.P. worked "beautifully[,] did all her work, did it all correctly").

[38] See id. at vol. IIB, p. 471.

[39] See id.

[40] See id.

[41] See id.

[42] See id. at p. 472.

[43] See id. at p. 473.

stopped doing so sometime in the fall, apparently at the direction of the school principal.[44]

The following month, V.P.'s mother and Powell engaged in a heated discussion in the school office.[45] A school clerk testified that Powell was careless with confidential information during the exchange, but was uncertain whether anyone other than school personnel was within earshot.[46]

In late November, school staff administered a series of tests and completed screening forms in an effort to evaluate V.P.'s educational abilities.[47] Testing was performed in both Spanish and English because of V.P.'s exposure to both languages.[48] On a language proficiency evaluation, Debra Charro ("Charro"), educational diagnostician, found V.P. to have Spanish and English language oral skills that were very low compared to others at her age level.[49] Charro opined that V.P. would find the Spanish oral language demands of age-level tasks impossible and English oral language demands very to extremely difficult.[50] The administration of other tests revealed that V.P.'s

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[44] See id. at p. 474; vol. IIC, p. 647.

[45] See id. at vol. IIA, pp. 122-23, 129, 131; vol. IIC, pp. 581-82.

[46] Id. at vol. IIA, pp. 127-28.

[47] See id. at vol. IV, pp. 876-908.

[48] See id. at p. 897.

[49] See id. at p. 880.

[50] See id.

performance in English was average in written language and written expression and low average in basic reading skills, reading comprehension, basic mathematics skills, and mathematics reasoning.[51] V.P.'s abilities to read and write in Spanish were negligible.[52]

A couple of days after testing V.P., Charro observed V.P.'s classroom performance, noting that she was attentive to the lesson presentation, did not participate in group reading of instructions, remained focused on the class assignment only for short periods of time before needing redirection, and did not finish the assignment.[53]

Williams completed a behavior rating scale for V.P. and ranked her as average in cooperation, attention, ability to organize, ability to adapt to change, acceptance of responsibility, and assignment completion.[54] Williams rated V.P. as above average in social acceptance and socialization.[55] As far as oral language skills, Williams gave V.P. the second lowest rating in every category: sentence structure,

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[51] See id. at p. 884. The record contains, without explanation, a second evaluation dated the same day, based on the same tests administered by the same evaluator, but which reflects that V.P. performed at an average level in all subjects. See id. at p. 890.

[52] See id. at p. 884.

[53] See id. at pp. 893, 900.

[54] See id. at p. 894.

[55] See id.

vocabulary ability, word recall, story-telling, idea formulation, and speech.[56]

Based on the above assessments, Charro issued a Full and Individual Initial Evaluation dated December 1, 2003.[57] She reported V.P.'s full scale intelligence quotient ("FSIQ") as 90, which is in the average range of functioning.[58] Among other recommendations, Charro suggested preferential seating, small group instruction and/or peer tutoring, small clusters of work, creative projects as alternatives to written reports, and use of pictures, objects, or charts to teach key vocabulary words and concepts.[59]

Charro indicated that V.P. needed to utilize hearing aids and assistive listening equipment to support her hearing needs.[60] She opined that V.P.'s severe discrepancies between intelligence and achievement in oral expression and listening comprehension was a product of her hearing loss rather than due to any learning disability.[61]

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[56] See id. at p. 895.

[57] See id. at pp. 897-909.

[58] See id. at p. 901.

[59] See id. at p. 905.

[60] See id.

[61] See id. at pp. 907, 909.

The next ARD meeting was held at the end of January 2004.[62] Attendees who had been at the previous meeting included V.P.'s parents, the school principal, the special education chair, the teacher for hearing-impaired students, and the LPAC representative.[63] In addition, V.P.'s ancillary teacher for writing, the educational diagnostician who evaluated V.P. in November, two attorneys, the deaf education manager, and the director of special education attended.[64] V.P.'s teacher was ill and did not attend, but later testified that she continued to have concerns at that time about V.P.'s grades and speech intelligibility.[65]

Charro presented the results of her educational evaluation.[66] It was noted that V.P. failed language arts and reading during the first and second nine weeks of the fall semester.[67] The ARD committee noted that V.P. was not attending content mastery, which was one of her IEP services agreed upon at the previous meeting.[68] The group reached a general consensus that content mastery was an important part of V.P.'s educational program and should be utilized by

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[62] See id. at pp. 1024-41.

[63] See id. at pp. 1019, 1041.

[64] See id. at p. 1041.

[65] See id. at vol. IIC, pp. 644-45.

[66] See id. at vol. IV., p. 1037.

[67] See id. at p. 1038.

[68] See id. pp. 1003, 1016, 1037.

V.P. for at least one hour per week.[69] They decided that, if V.P.'s teacher felt in-class support would be more appropriate at any particular time, she could schedule it in advance.[70] The record does not reflect that anyone in the meeting took responsibility for sharing this information with Williams.[71]

The deaf education manager, Gillian Brown ("Brown"), explained that special services had to be provided at a child's home school before the district's deaf education program could be considered as a placement.[72] She also noted that the school bore the responsibility of ensuring that the FM system was functioning properly.[73] Ivory reported that she had provided V.P.'s classroom teacher with inservice training on the FM system.[74] Discussion briefly addressed V.P.'s ability to participate in class discussions in light of the FM system's amplification of only the teacher's voice.[75] Brown made two suggestions to alleviate the problem, but favored passing the microphone around during classroom discussions over

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[69] See id. at p. 1038.

[70] See id.

[71] See id.

[72] See id. at p. 1037.

[73] See id.

[74] See id.

[75] See id.

providing a conference system, due to the increase in background noise with the latter option.[76]

The committee adopted the following modifications for V.P.: amplification system, visual cues, preferential seating, teacher presentation facing V.P., questioning for understanding, speech and language services, content mastery, small group instruction, and modifications on standardized testing.[77] The speech and language services included two hours per week of speech therapy and one hour per week with the itinerant teacher for hearing-impaired students.[78] V.P.'s plan involved a total of four hours of services per week out of the regular classroom.[79] The notes reflect consideration of the negative effects of the isolation from peers, but deemed it necessary for V.P.'s benefit.[80]

V.P.'s goals included developing auditory memory for sounds and words by identifying them sequentially (ninety percent mastery), discriminating between speech sounds accurately (eighty-five percent mastery), discriminating between like words differing in medial vowel sounds (eighty percent mastery), and

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[76] See id.

[77] See id. at pp. 1026, 1034, 1037, 1038.

[78] See id. at p. 1026.

[79] See id.

[80] Id. at p. 1034.

mastering grade level Texas Essential Knowledge and Skills (TEKS) concepts (seventy percent mastery).[81]

V.P.'s parents initially disagreed with the planned IEP because they supported placement in the oral deaf program at Sutton Elementary.[82] After some discussion with the deaf education manager, the director of special education, and the attorneys, the parents changed their decision and indicated their agreement with the proposed IEP.[83]

Although the IEP did not authorize the modification of classroom tests, Williams modified V.P.'s testing requirements in several ways, such as giving her fewer spelling words to learn and exempting her from sentence dictation examinations.[84] Williams implemented the modifications based on Powell's representation to Williams that the January ARD committee ordered testing modifications.[85] V.P.'s grades improved with the modifications.[86]

Frankiewicz performed a speech and language assessment in April 2004.[87] Upon review of education

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[81] See id. at pp. 1028, 1029.

[82] See id. at p. 1038.

[83] See id. at pp. 1038, 1041.

[84] See id. at vol. IIC, pp. 641-43, 649-51, 667.

[85] See id. at pp. 667, 677.

[86] See id. at p. 649.

[87] See id. at vol. IV, pp. 910-916.

records, observation, and a parent interview, Frankiewicz found that V.P.'s educational performance was below her grade-level placement.[88] She also reported that V.P. experienced difficulties in the areas of listening comprehension, oral expression, comprehension of long phrases and sentences, question response, and answer explanation, all of which interfere with V.P.'s success in class.[89] According to Frankiewicz, these difficulties most likely result from V.P.'s severe hearing loss.[90] V.P. also demonstrated inadequate ability "to use and understand the language in classroom speaking and listening tasks" and inadequate metalinguistic skills, per the report.[91] Other deficits included syntax, semantics, morphology, and pragmatics.[92]

Based on informal and standardized testing, Frankiewicz identified the following strengths: ability to follow simple directives, knowledge of classroom routines, ability to speak in basic sentences, and fluent speech.[93] She also identified the following weaknesses: "[i]nsufficient language skills to complete instructional tasks," "[l]imited use of language for a variety of academic purposes," "[l]imited use of effective

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[88] See id. at p. 911.

[89] See id. at p. 912.

[90] See id.

[91] See id.

[92] See id. at pp. 912, 914.

[93] See id. at p. 914.

strategies when attempting curricula tasks," misarticulation that affects intelligibility, difficulty with error sounds, "[t]hree or more phonological processes operating consistently," imprecise or unclear speech, "[i]nadequate processing of verbal and nonverbal stimuli," use of gestures in response to verbal stimuli on occasion, and use of incorrect or age-inappropriate vocabulary and syntactical patterns.[94]

Frankiewicz found that V.P. "exhibited a severe communication disorder secondary to the primary impairment(s) of auditory impairment" and that she continued to meet the eligibility criteria for speech impairment.[95] Frankiewicz recommended instructional strategies related to articulation, receptive language, expressive language, and voice.[96]

The ARD committee convened again on May 14, 2004.[97] In attendance were V.P.'s mother, her general education teacher, the school principal, the speech therapist, the special education chair, an LPAC representative, and two special education coordinators.[98] Ivory attended telephonically.[99]

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[94] See id.

[95] See id. at p. 915.

[96] See id. at pp. 915-16.

[97] See id. at pp. 1052-69.

[98] See id. at p. 1069.

[99] See id. at p. 1067.

Frankiewicz shared the results of her report and noted that V.P. was making progress in speech class.[100] Ivory reported that V.P. also was demonstrating improvement through her work with Earobics, a software program that assists with listening skills.[101] Williams reported that V.P.'s grades were Bs and Cs after modification of the material.[102] However, she expressed continuing concern about V.P.'s comprehension and conversation skills.[103]

After expressing appreciation for the efforts of the teachers, V.P.'s mother stated that she was dissatisfied with V.P.'s progress.[104] In particular, V.P.'s mother was concerned that the reports of progress were based on subjective criteria, that V.P. had not shown any growth, and that V.P. needed more intensive services.[105] She also questioned the November 2003 FSIQ score because it represented a twenty point drop from testing that occurred three years earlier.[106] V.P.'s mother announced that she

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[100] See id.

[101] See id.

[102] See id.

[103] See id.

[104] See id. at pp. 1067-68.

[105] See id.

[106] See id. at p. 1068.

planned to withdraw V.P. from Wainwright Elementary in order to enroll her in private school.[107]

In light of V.P.'s mother's disagreement with the proposed IEP and the absence of V.P.'s father at the meeting, the committee tabled the discussion for ten days.[108] On May 21, 2004, the committee reconvened.[109] V.P.'s father again was not in attendance.[110] V.P.'s mother, Williams, Ivory, and Frankiewicz, as well as the school principal, the special education chair, an LPAC representative, the special education director, and a special education coordinator were present.[111]

V.P.'s mother again expressed a desire for V.P. to have a more intensive language program.[112] Direct deaf education by Ivory was not included in V.P.'s IEP until January 2004.[113] Although Ivory stated that she had provided services for V.P. consistent with the requirements of the prior IEP, she did acknowledge that she owed V.P. a couple of more hours of service.[114] V.P.'s mother countered that she believed Ivory owed

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[107] See id.

[108] See id.

[109] See id. at pp. 1068, 1078-90.

[110] See id. at p. 1090.

[111] See id.

[112] See id. at p. 1089.

[113] See id.

[114] See id.

V.P. more than just a couple of hours of service.[115] The committee asked Ivory to review her service logs to determine whether the school owed V.P. additional service hours.[116]

The committee found that V.P. had made progress on all of her IEP goals in audiological services, that she passed all classes in general education with modifications.[117] The recommended additional services for V.P. were two hours per week of speech therapy, one hour per week of content mastery, and four hours per month of direct auditory-impairment services.[118] The committee approved V.P.'s IEP.[119] V.P.'s mother withheld her consent to the IEP.[120]

V.P.'s parents withdrew V.P. from Wainwright Elementary shortly after the May 21, 2004, ARD meeting and enrolled her in a private school, the Parish School, which is designed for children with different language-based learning disabilities.[121] She

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[115] See id.

[116] See id.

[117] See id.

[118] See id.

[119] See id.

[120] See id. at p. 1090.

[121] See id. at vol. IIB, pp. 370, 400, 489-90.

began attending the Parish School in September 2004.[122]

On August 20, 2004, Defendant filed a Request for Special Education Due Process Hearing and Required Notice with the Texas Education Agency.[123] The issues raised were: 1) whether Plaintiff failed to provide free appropriate public education ("FAPE") to V.P.; 2) whether Plaintiff failed to provide notice of an ARD committee meeting to V.P.'s parents; 3) whether Plaintiff improperly disclosed personally identifiable information about V.P.; 4) whether Plaintiff failed to identify in timely a fashion V.P.'s auditory impairment; 5) whether Plaintiff failed to develop IEPs reasonably calculated to provide educational benefit to V.P.; 6) whether Plaintiff failed to implement and/or deliver special education, related services, supplementary aids and services and/or assistive technology in V.P.'s IEPs; 7) whether Plaintiff denied V.P. her choice of mode of communication; 8) whether Plaintiff failed to provide properly trained staff to serve V.P.; and 9) whether Plaintiff failed to consider an appropriate placement for V.P.[124] The hearing officer conducted the due process hearing on December 13-15, 2004.[125]

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[122] See id. at vol. II.C, p. 572.

[123] See id. at vol. I, pp. 163-69.

[124] See Plaintiff's Original Complaint, Docket Entry No. 1, Ex. A, Final Decision of the Hearing Officer, ("Final Decision"), p. 2 (unnumbered).

[125] See id. at p. 3.

C. Hearing Officer's Decision

The hearing officer issued his decision on February 10, 2005.[126] He ruled in favor of Plaintiff on the second, third, fourth, sixth, seventh, and eighth issues raised, but found that Plaintiff had failed to provide V.P. with FAPE, to develop IEPs reasonably calculated to provide educational benefit to V.P., and to consider an appropriate placement for V.P.[127]

In his findings of fact, the hearing officer concluded that V.P. had intensive language development and auditory-processing deficiencies that stemmed from her hearing loss and an auditory-processing disorder.[128] He found that amplification alone was not sufficient to ameliorate her hearing loss and that she needed "interventions such as auditory training, memory training, phonemic awareness training, noise desensitization, sequencing ability training, gap-detection training, onset time training, visual instruction and an FM loop system."[129] Many of these interventions, such as noise desensitization training, gap-detection training, and sequencing training were never contemplated by the ARD committee, according to the hearing officer, and the services provided by Plaintiff fell short of allowing V.P. meaningful

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[126] See id. at p. 22.

[127] See id. at pp. 23-25.

[128] See id. at p. 11.

[129] See id. at p. 12.

progress in the area of auditory processing.[130] The hearing officer determined that V.P.'s improvement on the listening portion of the Stanford Achievement Test from kindergarten to first grade was "more attributable to the hearing aids provided by her parents than programming by [Plaintiff]."[131]

In addition to the rulings on the issues presented, the hearing officer considered whether V.P.'s parents were entitled to reimbursement for V.P.'s placement at the Parish School.[132] He concluded that the parents complied with the procedural conditions precedent and that the Parish School is an appropriate placement for V.P.[133] Accordingly, he awarded reimbursement "in accordance with the documented expenses."[134]

II. Standard of Review

The IDEA directs courts, when reviewing a state hearing officer's decision, to receive the records of the administrative proceedings, to hear additional evidence at the request of a party, and to grant appropriate relief based on a preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(c). The court must accord due weight to the hearing officer's findings, but also must review the evidence and must "reach an

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[130] See id.

[131] See id. at p. 13.

[132] See id. at p. 20.

[133] See id.

[134] See id.

independent decision based on a preponderance of the evidence." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347 (5th Cir. 2000)(quoting Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 252 (5th Cir. 1997)); see also Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 808 (5th Cir. 2003). The Fifth Circuit refers to the district court's standard of review as "virtually de novo." Adam J. ex rel. Robert J., 328 F.3d at 808; Bobby R., 200 F.3d at 347.

III. Analysis

Plaintiff moves for summary judgment reversing and vacating the hearing officer's decision with respect to the rulings against Plaintiff and affirming the decision with respect to the rulings in favor of Plaintiff. Defendant asks the court for the opposite relief: to affirm the portion of the hearing officer's decision that favors Defendant and to reverse the hearing officer's decision on those issues raised by Defendant in her counterclaim.[135]

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[135] Although Defendant does not move for summary judgment on the issues, she does state in the conclusion to her response: "V.P.'s parent is entitled to reimbursement of the costs of the Parish school. Moreover, in view of the significant procedural and substantive failures on the part of [Plaintiff,] V.P. is entitled to compensatory education." Defendant's Amended Response to Plaintiff's Motion for Summary Judgment, Docket Entry No. 46, p. 51. In her surreply, Defendant "urges this Court to affirm the portion of the hearing officer's decision on all issues appealed by [Plaintiff], reverse the decision on the Defendant's counter-claims, and order full reimbursement with interest on all costs" associated with the private school placement. Defendant's Surreply to Plaintiff's Motion for Summary Judgment, Docket Entry No. 52, p. 24. The court has determined that these issues should be

One of Defendant's arguments has an overriding impact on this recommendation and should be addressed first. Defendant contends that the one-year limitations period for requesting a due process hearing to challenge a child's educational placement should be tolled until V.P. reaches the age of eighteen.

A. Limitations Period

Section 16.001 of the Texas Civil Practice and Remedies Code tolls any limitations period for a person entitled to bring a personal action while that person is under a legal disability, which includes minority status. Defendant argues that section 16.001 tolls the limitations period for requesting due process hearings in IDEA actions. The court disagrees.

The Texas Administrative Code sets a time limit of one year within which *a parent or a public education agency* may request a due process hearing as provided by the IDEA. 19 Tex. Admin. Code § 89.1151(c); see also 20 U.S.C. § 1415(b)(6)(B), (f)(1)(A), (f)(3)(C). The law does not confer the right on the minor child to request a due process hearing. See 20 U.S.C. § 1415(f)(1)(A). Only after a student reaches the age of eighteen does she gain the IDEA rights that belonged to her parents during her minority. 34 C.F.R. § 300.520(a)(recodified from 34 C.F.R. § 300.517(a)); 19 Tex. Admin. Code § 89.1049. In other words, a student is never simultaneously: 1) entitled to request a hearing; and 2) under a legal disability due to her age.

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addressed as if it were considering cross-motions for summary judgment.

Defendant directs the court's attention to Hickey v. Irving, 976 F.2d 980, 981, 983 (5th Cir. 1992), a case that the Fifth Circuit remanded for the district court to consider the possibility of tolling the statute of limitations applicable to the Rehabilitation Act[136] due to the plaintiff's minority at the time of the alleged violation. That decision is inapposite because the plaintiff there, a former student, was the party to whom the Rehabilitation Act granted rights. Cf. id. at 983 n.4 (quoting the Rehabilitation Act's provision prohibiting discrimination against persons with handicaps). The other case cited by Defendant, Tex. Advocates Supporting Kids with Disabilities v. Tex. Educ. Agency, 112 S.W.3d 234 (Tex. App.–Austin 2003, no pet.), does not address the issue of tolling.

The plain language of the statutes applicable here grant the right to request due process hearings to parents or public education agencies, not minor students. Thus, section 16.001 of the Texas Civil Practice and Remedies Code does not apply in cases such as this one.

Applying the statute of limitations, the only time period covered by the present IDEA claim is August 20, 2003, through February 10, 2005. The period begins one year prior to the date that Defendant filed the instant request for a due process hearing and ends on the date that the hearing officer issued his decision. Any complaint based on Plaintiff's actions before this time period is barred by limitations. See 19 Tex. Admin. Code § 89.1151(c). As for complaints based on occurrences after the due process hearing, the court

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[136] 29 U.S.C. §§ 701-796l.

cannot exercise subject matter jurisdiction because Defendant has not exhausted administrative remedies under the IDEA. See 20 U.S.C. § 1415(i)(2)(A); Gardner v. Sch. Bd. Caddo Parish, 958 F.2d 108, 111 (5th Cir. 1992).

B. IDEA Substantive Law

The main thrust of the IDEA is to ensure that states provide disabled children with FAPE. See 20 U.S.C. §§ 1400(d)(1)(A), 1412(a), 1415(a); Morris v. Dearborne, 181 F.3d 657, 674 (5th Cir. 1999); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989). The IDEA contains both procedural and substantive requirements. See, e.g., 20 U.S.C. §§ 1412(a), 1414, 1415. Therefore, the focus of the court's review is twofold:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 (1982); see also, Adam J. ex rel. Robert J., 328 F.3d at 809; Bobby R., 200 F.3d at 346.

The IDEA procedures guarantee parents the right to examine all school records, the right to participate in the development of IEPs for their children, and the right to an impartial due process hearing at which they can air their complaints about the school district's "identification, evaluation, or educational placement of

the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6); see also 20 U.S.C. §§ 1415(b)(1)-(5), 1415(f). In certain situations, a procedural violation alone may "warrant a finding that, as a matter of law, the school has failed to provide a free appropriate public education." Adam J. ex rel. Robert J., 328 F.3d at 809, 811 (quoting Buser by Buser v. Corpus Christi Indep. Sch., 51 F.3d 490, 493 (5th Cir. 1995)). However, the procedural violation must result in the loss of an educational opportunity in order to be actionable. Adam J. ex rel. Robert J., 328 F.3d at 812.

In deciding the second question, the Fifth Circuit directs courts to consider: 1) whether "the program is individualized on the basis of the student's assessment and performance;" 2) whether the program is implemented in the least restrictive environment; 3) whether the services are coordinated and collaborative; and 4) whether "positive academic and non-academic benefits are demonstrated." Michael F., 118 F.3d at 253. School officials must develop an IEP for each student and must determine the appropriate placement for the student. Daniel R.R., 874 F.2d at 1039.

The placement is appropriate if it is designed to meet the particular child's needs and includes services that will permit the child to benefit from instruction, even if it is not the "best possible" placement. Adam J. ex rel. Robert J., 328 F.3d at 808. The party attacking the appropriateness of an IEP or a placement recommended by the school bears the burden of demonstrating why it is inappropriate. Adam J. ex rel Robert J., 328 F.3d at 808; Michael F., 118 F.3d at 252.

C. Discussion

Plaintiff argues that the hearing officer erred in concluding that Plaintiff denied Defendant FAPE and that Plaintiff must reimburse V.P.'s parents for the cost of private school. Plaintiff argues in favor of the hearing officer's decision as to the procedural violations alleged against Plaintiff.

Defendant argues in response that the hearing officer's decision is correct with regard to his rulings that V.P. was denied FAPE and that the Parish School is an appropriate placement for V.P. Based on the latter issue, Defendant argues in favor of full reimbursement for V.P.'s tuition at the Parish School, including semesters of attendance during the pendency of this appeal.[137] She also contends that the decision is not supported with regard to the following procedural violations: failure to notify the parents of an ARD meeting, disclosure of confidential information, failure to identify V.P.'s auditory impairment in a timely fashion, and failure to deliver assistive technology in the form of an amplification system. The court addresses the arguments by turning first to Defendant's allegations of procedural violations.

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[137] Although the parties ask the court to consider whether V.P.'s parents are entitled to reimbursement of private school expenses as ordered by the hearing officer, neither Plaintiff nor Defendant has moved for summary judgment on reimbursement for expenses during the continuing placement at the Parish School. Therefore, the court leaves consideration of that matter for another day.

1. Alleged Procedural Violations

Beginning with notification of ARD meetings, the court acknowledges that the regulations require the public agency to provide timely notice of meetings. 34 C.F.R. § 300.322(a). The summary judgment briefs contain no details of what meeting Plaintiff failed to provide notice to V.P.'s parents. The administrative record includes copies of notices sent to V.P.'s parents prior to all of the meetings. At least one of V.P.'s parents attended each of the ARD meetings. This is a nonissue.

Education agencies are given the responsibility of protecting the confidentiality of personally identifiable information regarding children with disabilities. See 34 C.F.R. §§ 300.123, 300.610-300.626. Defendant's allegation that a loud exchange in the school office between V.P.'s mother and Powell compromised confidential information about V.P. is simply not supported by the evidence. According to the testimony, no one other than staff was present during the exchange. Upon prompting, the office clerk who witnessed the exchange speculated that, although she was not aware of the presence of anyone else in the vicinity, it was possible that a parent may have been within hearing range. This allegation lacks any evidentiary support.

The regulations contain detailed evaluation procedures, including timing requirements. See 34 C.F.R. §§ 300.301, 300.304-300.305. The ARD committee qualified V.P. as having an auditory impairment in May 2003 based on prior audiological testing. Because Defendant did not file a request for a due process hearing until August 2004, any complaint

of a delay in identification prior to the May 2003 ARD is barred by the applicable one-year statute of limitations. See 19 Tex. Admin. Code § 89.1151(c).

A child with disabilities who is maintained in general education classes is entitled to supplemental aids and services necessary to achieve an educational benefit. See 20 U.S.C. § 1412(a)(5)(A). Defendant complains that she did not receive needed assistive technology because of the difficulties with the FM loop system. The court finds that this issue is not a procedural challenge, but, rather, is relevant to the court's analysis of the provision of FAPE.

The hearing officer's determinations on the first three of the above four issues should be affirmed. As to the fourth, it is best consolidated with the discussion below.

2. Provision of FAPE

The court turns to the more significant question in this case: whether Plaintiff provided V.P. with FAPE. The court employs the four Michael F. factors for this evaluation and finds that all four weigh against Plaintiff.

a. Individualized Program

The IEP must be designed to meet the particular student's needs and include "sufficient support services to allow him to benefit from the instruction." Adam J. ex rel. Robert J., 328 F.3d at 810.

During the relevant time period, the ARD committee held four meetings. V.P. qualified for

special services as speech impaired and hearing impaired. In May 2003, when the committee first determined that she qualified under the auditory-impairment category, it recommended an audiological evaluation.[138] Again, in the October 2003, the committee mentioned an audiological evaluation.[139] As of May 2004, one year after the original recommendation, the evaluation still had not been completed.[140]

The committee recognized that V.P. continued to have auditory-processing difficulties despite the use of hearing aids and the FM loop system. Even so, the IEPs were not specific enough with regard to V.P.'s audiological deficiencies.[141] For example, they lacked strategies to assist with sequencing, gap detection, and noise desensitization.[142] According to expert testimony at the hearing, these strategies should be implemented as soon as possible to allow maximum development of the neurons in the auditory system.[143]

The committee acknowledged that V.P.'s most significant problems were speech and language deficiencies due to hearing loss. Yet, the committee did

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[138] See A.R., vol. IV, p. 978.

[139] See id. at p. 1017.

[140] See id. at vol. IIA, pp. 210-11, 213.

[141] See id. at pp. 58-60.

[142] See id. at p. 58.

[143] See id.

not integrate special education sessions with the teacher for hearing-impaired students until January of 2004. Even then, the question arose whether Ivory provided as many hours of service as recommended by the ARD committee. Ivory's tabulation of the hours that she provided services to V.P. grossly exceeded Williams's recollection of time V.P. was out of the classroom for that purpose.[144]

Additionally, the ARD committee failed to address problems with the FM loop system at the meetings. Repair of the loop and problems with the headphone system were not even mentioned in the notes of the October 2003 meeting, even though Ivory observed V.P. using the headphone system incorrectly on that same day.[145]

The court finds that the interventions, strategies, and goals of V.P.'s IEPs were not sufficiently individualized to her needs.

b. Least Restrictive Environment

The IDEA mandates that the student be placed in the least restrictive environment:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children

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[144] Compare id. at vol. IIIB, pp. 511-48 with id. at vol. IIC, pp. 669-70.

[145] See id. at vol. IIIB, p. 513.

> with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). In its lengthy discussion of the IDEA's requirement that students be "mainstreamed" into general education as much as possible, the Daniel R.R. court enunciated a two-part analysis for courts to use in determining school compliance: 1) "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child;" and 2) "whether the school has mainstreamed the child to the maximum extent appropriate." Daniel R.R., 874 F.2d at 1048. To aid in this individualized, fact-specific inquiry, the Fifth Circuit suggested that courts examine, along with any other pertinent factors: 1) the steps taken by a school to accommodate the disabled child in general education; 2) the extent to which the student receives an educational benefit from general education; and 3) the effect the disabled student has on the general education population. Id. at 1048-49.

In the fall of 2003, V.P. remained in the general education class except when she attended speech therapy for two hours a week or, during the first couple of months of the semester, when she participated in content mastery. The concern in this case is not whether V.P. was mainstreamed to maximum extent possible, but whether she was mainstreamed beyond her capabilities.

As noted above, V.P. needed additional hearing-impaired education, but did not receive the service until after the January 2004 ARD meeting. After V.P. stopped attending content mastery in the fall of 2003, no substitute service replaced it. In fact, the teaching aide who intermittently had assisted V.P. in her general education class ceased providing that service. The record contains no evidence suggesting that anyone on staff tried to reconnect V.P. with content mastery until after the next ARD meeting in the spring, at which time the committee solidly endorsed content mastery as a crucial part of V.P.'s IEP.

When Charro observed V.P. in class during November 2003, she noted that V.P. paid attention to the teacher's portion of the lesson, but did not participate in the group portion. She also observed that V.P. could remain focused on her assignment only for short periods without redirection. V.P.'s FM system did not allow her the benefit of class discussions. The proposed solution, to have the teacher pass the microphone around the class during discussions (a less-than-ideal proposition), was not presented to the ARD committee until the January 2004 meeting. Nothing in the record indicates whether V.P.'s teacher, who was not at the January meeting, was even given that suggestion, much less ever employed it. Additionally, during the time that the loop component was unavailable, the use of headphones further limited V.P.'s ability to hear classmate voices and class discussions.[146]

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[146] See A.R., vol. IIB, p. 461.

In every ARD meeting within the relevant time period, the discussion addressed placement at one of the district's schools that offered more intensive programming for hearing-impaired students. In October 2003 and January 2004, the committee decided against the more restrictive placement solely on the basis that services first should be attempted at Wainwright.[147]

After V.P. lost her hearing aids on the playground, she regularly took them off and left them on her teacher's desk before going out to play.[148] Nothing in the record suggests that any member of the ARD committee spoke with V.P. or her parents about this practice, which resulted in auditory isolation for V.P. during recess and restricted her opportunity to socialize with other students.

Overall, the court finds that V.P.'s placement did not provide her with sufficient supplementary services to be successful in the general education environment.

c. Coordinated and Collaborative Services

Coordination and collaboration among the key "stakeholders" is a necessary component of FAPE. See Michael F., 118 F.3d at 253.

Here, the ARD committee meetings were well-attended and included the key stakeholders (with the exception of Williams's absence from the January 2004

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[147] See id. at vol. IV, pp. 1016, 1037.

[148] See id. at vol. IIA, p. 106.

meeting). However, communication between ARD meetings lacked coordination and collaboration. For example, Powell, the special education chair, never discussed V.P.'s progress with Williams outside of the ARD meetings.[149] Williams also noted that she did not discuss V.P. with V.P.'s writing teacher or any other school staff member except during meetings.[150]

The record does not reflect that anyone informed Williams of the decisions made during the January 2004 ARD, even though implementation required Williams's involvement. Actually, the only information given to Williams after that ARD meeting was not accurate. According to Williams, Powell instructed Williams to modify V.P.'s classroom tests to be in compliance with V.P.'s IEP. No such modification was incorporated into V.P.'s IEP, although the committee did authorize modifications for standardized testing.

In addition to poor communication outside of the ARD meetings, the school staff struggled with training and followup. Regarding training, Ivory's reliance on the one-page flyer to train school staff on working with hearing-impaired students was inadequate.[151] This was no more apparent than when Powell denied, during a meeting with V.P.'s mother and other school staff, that she had ever seen the tips sheet.

By the nurse's own account, she received very little training on the FM system and provided very little to

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[149] See id. at vol. IIC, p. 660.

[150] See id. at pp. 659, 660.

[151] See id. at vol. IIA, pp. 88-89.

the other staff members, some of whom questioned whether the system was working properly or being used correctly. Although she was charged with the oversight of V.P.'s FM system, she did not attend the ARD committee meetings. Communication with T.H. Rogers Elementary staff regarding the repair of the loop component was inadequate and, perhaps, led to a significant delay in replacement of the loop. The court questions the followup efforts to get the loop replaced quickly.

The staff also failed to followup on V.P.'s lack of attendance in content mastery. V.P.'s mother and school staff agreed to give V.P. a break of a couple weeks after the incident with Powell, but, according to the record, no one followed up with V.P. when she failed to return for more than two months. Additionally, the record contains no evidence that anyone specifically followed up on the October 2003 ARD committee plan to try the proposed modifications at Wainwright for thirty days before revisiting the possibility of placement in Sutton Elementary's oral deaf program.

The court finds that the services provided to V.P. were not coordinated and collaborative.

d. Academic and Non-academic Benefits

Although the IDEA only guarantees an appropriate (as opposed to the best possible) education, the benefit conferred upon the student "'cannot be a mere modicum or de minimis,' but 'must be meaningful' and 'likely to produce progress.'" Adam J. ex rel. Robert J., 328 F.3d at 808-09 (quoting Michael F., 118 F.3d at 248).

The testimony on V.P.'s progress is equivocal. On the one hand, Ivory and Roushani reported that V.P. was progressing. Williams and V.P.'s mother were not encouraged by their observations of V.P.'s work over the course of the year. Reports from Frankiewicz included both positive and negative impressions. V.P. continued to have difficulty understanding in the classroom, and her speech remained difficult to understand.[152] V.P.'s scores on objective measures did not improve over time.[153]

V.P. failed language arts and reading during the first two nine-week periods of the fall semester. Her grades improved when her teacher implemented modifications for classroom tests. Her teacher indicated that she would not have been achieved passing grades without the modifications.[154] V.P. met the promotion standards for second grade based on her grades and met district standards on standardized testing with modifications.[155] Even so, V.P.'s general education teacher harbored some doubts about V.P.'s readiness for second grade, stating that V.P. had not mastered the curriculum necessary to be successful in second.[156]

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[152] See A.R., vol. IIA, pp. 215-16.

[153] See id at pp. 218 (stating the V.P.'s test scores showed that she was not *regressing*), 252-54 (indicating that her scores remained in the fifties), 264-65 (same).

[154] See id. at vol. IIC, pp. 650-51.

[155] See id. at pp. 676, 855.

[156] See id. at vol. IIC, pp. 650-51, 674, 676-77.

The court finds that V.P.'s progress was minimal and any benefit she received from the services provide for her at Wainwright was not meaningful.

3. Reimbursement

A hearing officer may award reimbursement costs for private school enrollment to the parents of a former student of the state agency if the agency did not make "FAPE available to the child in a timely manner prior to that enrollment and . . . the private placement is appropriate." 34 C.F.R. § 300.148(c) (previously codified at 34 C.F.R. § 300.403(c)); see also Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985); Michael F., 118 F.3d at 248. "Reimbursement will be permitted under Burlington when unilateral placement by parents is generally found to be appropriate, even though it is not 'the exact proper placement required under the Act.'" Michael F., 118 F.3d at 248 n.13 (quoting Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 (5th Cir. 1986)).

The court has the discretion to grant relief as it deems appropriate. 20 U.S.C. § 1415(i)(2)(c); Alamo Heights Indep. Sch. Dist., 790 F.2d at 1161. Thus, if the court determines that the placement chosen by the parents confers a greater educational benefit than that required by the IDEA, the court may award something less than full reimbursement. See Alamo Heights Indep. Sch. Dist., 790 F.2d at 1161. Factors to consider in the determination is whether other, more suitable substitute placements exist, whether the parents expended sufficient effort in securing an alternative placement, and whether the school district cooperated with the parents on the child's placement. Id.

As the court already has determined that Plaintiff failed to provide V.P. with FAPE, the only question is whether placement at the Parish School was appropriate. There can be little doubt that it was an appropriate placement. V.P.'s received small group instruction and ten hours of group speech/language therapy per week; the teaching staff was supervised by speech/language pathologists; V.P. received intensive audiological and language education.[157]

The question remains, however, whether the Parish School was more than merely "appropriate." If so, Defendant may not be entitled to full reimbursement. Because the parties provided minimal briefing on the issue of the appropriateness of placement at the Parish School and no briefing on the factors that should be considered in deciding whether to reimburse costs in full, the court stops at its determination that Defendant is entitled to some amount of reimbursement.

IV. Conclusion

The court finds that the hearing officer's decision is correct with regard to Plaintiff's failure to provide FAPE, to develop educationally beneficial IEPs for V.P., and to consider an appropriate placement for V.P. The court further finds the decision to be correct on the issues challenged by Defendant. Because both parties have briefed these matters extensively and request that the court issue a decision affirming or reversing the hearing officer's decision, the court should adjudicate these matters on summary judgment.

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[157] See A.R., vol. IIB, pp. 375, 380-81, 391.

Based on the foregoing, the court **RECOMMENDS** that Plaintiff's motion for summary judgment be **GRANTED IN PART AND DENIED IN PART**. Although Defendant requests reimbursement for the costs of the Parish School during the pendency of this review, she did not move for summary judgment on that issue. The court refrains from addressing that matter at this time. Also, the court leaves for another day consideration of whether reimbursement should be full or something less than full.

The Clerk shall send copies of this Memorandum, Recommendation, and Order to the respective parties who have ten days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, either electronically or by mail to P.O. Box 61010, Houston, Texas, 77208. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 2nd day of March, 2007.

/s/
Nancy K. Johnson
United States Magistrate Judge

APPENDIX F

TEA DOCKET No. 405-SE-0804

[Signed February 10, 2005]

VALENCIA P.,	)
b/n/f MR. and MRS. JUAN P.	)
Petitioner	)
	)
v.	)
	)
HOUSTON INDEPENDENT	)
SCHOOL DISTRICT	)
Respondent.	)
	)

BEFORE A SPECIAL EDUCATION
HEARING OFFICER
FOR THE
STATE OF TEXAS

FINAL DECISION OF THE HEARING OFFICER

Appearances for Petitioner:

Daniel L. McCall
Attorney at Law
Katy, TX

Appearances for Respondent:

Hans P. Graff
Assistant General Counsel
Houston Independent School District

Statement of the Case

The Petitioner, Valencia P., by her next friends, Mr. and Mrs. Juan P., brings this action against the Respondent, Houston Independent School District (HISD), under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq. The Petitioner raises the following issues to be heard at a Due Process Hearing:

1. Whether Houston Independent School District failed to provide a free appropriate public education (FAPE) to Valencia P.?

2. Whether Houston Independent School District failed to provide notice of an admission, review and dismissal (ARD) committee meeting to the parents of Valencia P.?

3. Whether Houston Independent School District improperly disclosed personally identifiable information about Valencia P. without parental consent?

4. Whether Houston Independent School District failed to timely identify an auditory impairment of Valencia P.?

5. Whether Houston Independent School District failed to develop individualized education

programs (IEPs) reasonably calculated to provide educational benefit to Valencia P.?

6. Whether Houston Independent School District failed to implement and/or deliver special education, related services, supplementary aids and services and/or assistive technology in the IEPs of Valencia P.?

7. Whether Houston Independent School District denied Valencia P. her choice of mode of communication?

8. Whether Houston Independent School District failed to provide properly trained staff to serve Valencia P.?

9. Whether Houston Independent School District failed to consider an appropriate placement for Valencia P.?

As relief, the Petitioner requests: (1) compensation to Valencia's parents for the costs of a private educational placement; (2) compensation to Valencia's parents for the cost of lost hearing aids; and (3) such other appropriate relief to which Valencia may be entitled.

Procedural History

The Texas Education Agency (TEA) received the request for a Due Process Hearing on August 20, 2004. The Hearing Officer, after allowing the Petitioner a delay to secure legal counsel, conducted a prehearing conference on September 30, 2004. The Hearing Officer subsequently issued the First Interim Order that,

among other things, identified the issues and relief, set a hearing date and extended the decision due date. On November 2, 2004, the Petitioner requested a continuance of the hearing; the request was granted. On November 16, 2004, the Hearing Officer rescheduled the hearing and extended the decision due date to January 31, 2005. The Due Process Hearing was conducted on December 13-15, 2004 in Houston, TX. The Hearing Officer issued a Post-Hearing Order on January 12, 2004 that permitted the parties to file written closing statements and extended the due date to February 11, 2005. The parties submitted their written closing arguments on January 14, 2005, at which time the record was closed.

Findings of Fact

Based upon the testimony and evidence taken on the record in this proceeding, I make the following findings of fact:

1. Valencia P. is an eight year-old child whose dominant language is English. Tr. at v. 2, pp. 348, 360; Tr. at v. 3, p. 597, 724; Pet'r Ex. 10; Resp't Ex. 10.

2. Valencia is a child with a disability. She qualifies under the IDEA eligibility categories of auditory impairment, speech impairment and/or other health impairment. Tr. at v. 1, p. 37; Tr. at v. 3, p. 841; Pet'r Ex. 21, 40; Resp't Ex. 21.

3. In the 2001-02 school year, Valencia was in pre-K at Wainwright Elementary School. Tr.

at v. 1, pp. 189, 191; Pet'r Ex. 15, 16; Resp't Ex. 15, 16.

4. In the 2002-03 school year, Valencia was in Kindergarten at Wainwright Elementary School. Tr. at v. 2, pp. 287-88; Pet'r Ex. 17; Resp't Ex. 17.

5. An ARD committee meeting was held for Valencia on October 8, 2002. Among other things, the committee continued the identification of Valencia as a child with a speech impairment. The committee noted that there was an indication of a severe auditory language disorder. The committee determined that it would pursue either an auditory impairment label or other health impairment label depending upon guidance from district evaluators. Valencia's mother expressed concern about the possibility of an auditory-processing disorder. Tr. at v. 1, pp. 188, 196-97; Tr. at v. 2, p. 294, 335, 445; Pet'r Ex. 17; Resp't Ex. 17.

6. The October 8th ARD committee included a speech therapy IEP covering the 2002-03 school year. Valencia's present level of performance was assessed as having adequate voice quality. The committee approved two (2) hours of speech therapy per week. The goals of the speech IEP were to increase Valencia's receptive and expressive language skills. The IEP had four benchmarks. Tr. at v. 1, p. 194; Pet'r Ex. 17; Resp't Ex. 17.

7. A district otological evaluation report on Valencia was prepared on January 21, 2003. A district communication assessment report on her was prepared on April 10, 2003. Tr. at v. 1, p. 203; Pet'r Ex. 7, 18; Resp't Ex. 7, 18.

8. Valencia's parents secured a private audiological test in March, 2003. The evaluator found that Valencia had moderate hearing loss. Tr. at v. 1, p. 163; Ex. 9.

9. In Spring, 2003, Valencia received hearing aids. She was provided a pair of loaner aids in February, 2003. She was provided her own custom aids in May, 2003. Tr. at v. 1, pp. 143, 179; Tr. at v. 2, p. 288; Pet'r Ex. 9, 18; Resp't Ex. 9, 18.

10. An ARD committee meeting was held for Valencia on May 8, 2003. Among other things, the committee considered whether Valencia had an auditory impairment. A nurse reviewed a district otological report about four months old showing that Valencia had a moderately severe hearing loss. An itinerant teacher for the auditory impaired presented an audiologic examination over three (3) years old showing that Valencia had a mild to moderate hearing loss bilaterally. The committee qualified Valencia as a child with an auditory impairment but agreed that a new audiological exam and an auditory-processing disorder assessment were needed. Valencia's mother was present at the ARD meeting. Tr. at v. 1, p. 203; Tr. at

v. 2, pp. 309-10, 319, 456; Pet'r Ex. 1, 7, 18; Resp't Ex. 1, 7, 18.

11. The May 8th ARD committee also continued the identification of Valencia as a child with a speech impairment. Pet'r Ex. 18; Resp't Ex. 18.

12. The May 8th ARD committee decided that Valencia would remain at her campus for services with a recommendation for small group instruction. Pet'r Ex. 18; Resp't Ex. 18.

13. The May 8th ARD committee developed an IEP for audiological management for the 2003-04 school year (Valencia's first (1st) grade year). The audiological management IEP included three benchmarks aimed at ensuring that 75 percent of the time Valencia properly uses her new hearing aids and an FM loop system. Pet'r Ex. 18; Resp't Ex. 18.

14. The May 8th ARD committee completed an auditory impairment supplement. The committee indicated that Valencia's mode of communication is "oral/auditory." Tr. at v. 3, pp. 785-86; Pet'r Ex. 18; Resp't Ex. 18.

15. The May 8th ARD committee included a one-page tips sheet for working with hearing impaired students. The committee noted that Valencia's speech was 65 to 75 percent intelligible with noticeable articulation errors. It also noted that she needed specific

speech strategies. Pet'r Ex. 7, 18; Resp't Ex. 7, 18.

16. The May 8th ARD committee extended the speech therapy IEP from the October 8, 2002 ARD committee meeting and continued two (2) hours of speech therapy per week for the 2003-04 school year. Pet'r Ex. 18; Resp't Ex. 18.

17. In May, 2003, the district provided Valencia an FM loop system for the last week of Kindergarten. Tr. at v. 2, p. 317, 452.

18. A district audiological evaluation was conducted and a report prepared on Valencia on June 27, 2003. Tr. at v. 2, p. 476; Tr. at v. 3, pp. 755, 758, 769; Pet'r Ex. 9; Resp't Ex. 9.

19. In the 2003-04 school year, Valencia was in first (1st) grade at Wainwright Elementary School. Tr. at v. 3, pp. 631-32; Pet'r Ex. 19; Resp't Ex. 19.

20. The Wainwright Elementary school nurse oversaw the use of the FM loop system. Tr. at v. 2, pp. 407-08.

21. The campus nurse provided training on the FM loop system although that was the responsibility of a district audiologist. There was no regular consultation about the FM loop system. Tr. at v. 2, p. 398, 408, 412; Tr. at v. 3, p. 796.

22. In September, 2003, Valencia's FM loop system was damaged or became inoperable. The FM loop system was out of service for about two months. The school replaced the FM loop with a headphone system. Tr. at v. 1, pp. 222-23; Tr. at v. 2, pp. 410, 412, 459-61, 464; Tr. at v. 3, p. 636; Pet'r Ex. 32; Resp't Ex. 32.

23. Due to a lack of training, school personnel allowed Valencia, at times, to wear the headphone system over her hearing aids; wearing the headphones over the hearing aids was not proper. Tr. at v. 1, pp. 155, 157; Tr. at v. 2, p. 411, 461-64; Tr. at v. 3, pp. 637-38; Pet'r Ex. 32; Resp't Ex. 32.

24. The FM loop system remained inoperable longer than necessary due to confusion and miscommunication about the procedure to get it repaired or replaced. Tr. at v. 2, pp. 414-16, 461.

25. An ARD committee meeting was held for Valencia on October 7, 2003. Among other things, the committee continued Valencia's qualification as a child with auditory and speech impairments and maintained her in her first-grade classroom. Valencia's mother was present at the ARD meeting. Pet'r Ex. 19; Resp't Ex. 19.

26. The October 7th ARD committee discussed Valencia's need for intensive language therapy. Her first grade teacher relayed her concerns about Valencia's comprehension

and not being able to understand Valencia's speech. The committee agreed that more testing of Valencia was needed, including a new audiological evaluation and learning disability assessment. The district's June 27th audiologic report was not reviewed. Tr. at v. 2, pp. 465-66, 478-79; Tr. at v. 3, p. 644; Pet'r Ex. 19; Resp't Ex. 19.

27. The October 7th ARD committee included a speech therapy IEP covering the 2003-04 school year. Valencia's present level of performance was assessed as having adequate voice quality and being able to follow simple/basic directions. The goal of the speech IEP was for Valencia to develop and use language skills to communicate meaning with others in her environment. The IEP had three benchmarks – all the same as in the speech IEP of October 8, 2002. The committee continued two (2) hours of speech therapy per week. Pet'r Ex. 19; Resp't Ex. 19.

28. The October 7th ARD committee indicated that Valencia would not be off grade level in her regular first-grade class. She was to receive modifications of in-class support, frequent breaks, content mastery and speech therapy. Tr. at v. 2, pp. 466-67; Tr. at v. 3, p. 678; Pet'r Ex. 19; Resp't Ex. 19.

29. The October 7th ARD committee provided for one-on-one assistance (aide) for Valencia. Tr. at v. 1, p. 216; Tr. at v. 2, p. 473; Tr. at v. 3, pp. 647-48, 852; Pet'r Ex. 19; Resp't Ex. 19.

30. The October 7th ARD committee did not complete an auditory impairment supplement. Pet'r Ex. 19; Resp't Ex. 19.

31. A teacher certified in the education of auditory-impaired students was present at the ARD committee meeting per state law. Pet'r Ex. 19; Resp't Ex. 19.

32. In Fall, 2003, Valencia lost her hearing aids once while out on the school playground. After recovery or replacement, Valencia was not allowed to wear her hearing aids all day long; Valencia had to remove her hearing aids before going out to play. Tr. at v. 1, pp. 105-06; Tr. at v. 2, p. 398.

33. In October, 2003, Valencia appeared at the content mastery center in her school to work with the campus special education chair. The special education chair, in the process of covering a lesson, became impatient and frustrated with Valencia due to Valencia's limitation in grasping the lesson. The special education chair's tone of voice and conduct in reacting to Valencia were inappropriately harsh, retaliatory and unprofessional causing Valencia to cry and become unnecessarily distressed and upset. Tr. at v. 1, pp. 238- 42; Tr. at v. 2, pp. 467-69; Tr. at v. 3, p. 580.

34. On or about November 11, 2003, Valencia 's mother, Mrs. P., and the campus special education chair had an encounter in the office of Wainwright Elementary. They

became upset with each other and their conversation became animated before Mrs. P. left the office. Tr. at v. 1, pp. 122, 129, 131, 133; Tr. at v. 3, p. 581.

35. In November, 2003, the principal of Wainwright Elementary and/or the campus special education chair disallowed the aide for Valencia without an ARD committee meeting. Tr. at v. 2, pp. 474-75; Tr. at v. 3, p. 647.

36. On November 19, 2003 and December 1, 2003, HISD evaluated Valencia and completed a full and individual evaluation (FIE) report on December 1, 2003. Tr. at v. 3, p. 726; Pet'r Ex. 12; Resp't Ex. 12.

37. An ARD committee meeting was held for Valencia on January 26, 2004. Among other things, the committee continued Valencia's qualification as a child with auditory and speech impairments and maintained her in her first-grade classroom while noting that she required more small group instruction. Valencia's mother was present with an attorney and advocate. Pet'r Ex. 20; Resp't Ex. 20.

38. The January 26th ARD committee considered the district's December, 2003 FIE and determined that Valencia did not qualify as learning disabled because her hearing loss could not be ruled out as the cause of significant discrepancies between intelligence and achievement in oral

expression and listening comprehension. Tr. at v. 1, pp. 243- 45; Tr. at v. 3, pp. 734, 741, 744, 746-47; Pet'r Ex. 13, 20; Resp't Ex. 13, 20.

39. The January 26th ARD committee reviewed the district's June, 2003 audiological report and discussed Valencia's failing grades and need for more services. The committee recommended a new speech and language assessment. Tr. at v. 3, pp. 813, 821; Pet'r Ex. 20; Resp't Ex. 20.

40. The January 26th ARD committee extended the speech therapy IEP from the October 7, 2003 ARD committee meeting and continued two (2) hours of speech therapy per week. Pet'r Ex. 20; Resp't Ex. 20.

41. The January 26th ARD committee meeting developed an IEP for language and listening skills. An itinerant teacher for the auditory-impaired was identified as the service provider; she was to see Valencia one (1) hour per week. The goal of the IEP was to improve Valencia's vocabulary comprehension. The IEP had three benchmarks: develop auditory memory, accurately discriminate between speech sounds and accurately discriminate between like words differing in medial vowel sounds. The Earobics program was selected as the mechanism to reach the goal. Tr. at v. 1, pp. 57-58, 219; Tr. at v. 3, pp. 669-70, 797, 813, 847; Pet'r Ex. 20; Resp't Ex. 20.

42. The January 26th ARD committee completed an auditory impairment supplement. The committee continued the indication that Valencia's mode of communication was oral/auditory. Tr. at v. 3, p. 833; Pet'r Ex. 20; Resp't Ex. 20.

43. The January 26th ARD committee meeting specified procedures for an aide to assist Valencia in her first-grade classroom. Tr. at v. 3, p. 853; Pet'r Ex. 20; Resp't Ex. 20.

44. The January 26th ARD committee became aware of a complication with Valencia's use of the FM loop system. Because only the teacher wears the system microphone, Valencia is not receiving amplification of the voices of her peers during class and group discussions. Pet'r Ex. 20; Resp't Ex. 20.

45. The January 26th ARD committee continued content mastery for Valencia and added a content mastery IEP for one (1) hour per week. The goal for Valencia was to demonstrate grade-level mastery of the Texas Essential Knowledge and Skills (TEKS) state curriculum. Tr. at v. 1, p. 59; Tr. at v. 2, p. 482; Pet'r Ex. 20; Resp't Ex. 20.

46. The January 26th ARD committee indicated that Valencia would not be off grade level in the spring term of her first grade year. She was to receive modifications of speech, amplification, visual cues, teacher facing student, preferential class seating and questioning to check understanding. The

committee did not approve any testing modifications for Valencia. Tr. at v. 3, pp. 679-80; Pet'r Ex. 20; Resp't Ex. 20.

47. A teacher certified in the education of auditory-impaired students was present at the ARD committee meeting per state law. Pet'r Ex. 20; Resp't Ex. 20.

48. Valencia's first grade teacher was not able to attend the January 26th ARD committee meeting. She testified that she would have expressed concerns about Valencia had she been present. Tr. at v. 3, pp. 644-45.

49. In January, 2004, a new resource teacher began working with Valencia in the content mastery center. Tr. at v. 2, p. 473.

50. The itinerant teacher for students with auditory impairments was slated to provide one (1) hour per week of language and listening services. The services were to begin in February, 2004. The itinerant teacher missed providing at least two and one-half (2½) hours of services between February and May, 2004. Tr. at v. 2, p. 486; Tr. at v. 3, pp. 669-70, 847-48; Pet'r Ex. 20, 21; Resp't Ex. 20, 21.

51. At the direction of the campus special education chair, without an ARD committee meeting, the first grade teacher began modifying tests and quizzes given to Valencia. Tr. at v. 2, pp. 537-38; Tr. at v. 3, pp. 641-43, 649-50, 667, 677-80.

52. Valencia's grades began to improve in the third and fourth grading periods as a result of the testing and quiz modifications but she did not learn at the first-grade TEKS level. Tr. at v. 3, pp. 665, 673-74, 676.

53. On April 2, 2004, HISD conducted a speech and language evaluation of Valencia. Tr. at v. 1, p. 246; Pet'r Ex. 14; Resp't Ex. 14.

54. An ARD committee meeting was held for Valencia on May 14, 2004. Among other things, the committee continued Valencia's qualification as a child with auditory and speech impairments and maintained her in her first-grade classroom while noting that she required more small group instruction. Pet'r Ex. 21; Resp't Ex. 21.

55. The May 14th ARD committee meeting reviewed the district's April, 2004 speech and language evaluation. The evaluation report showed that Valencia had a severe language disorder with deficits in comprehension and expression. Pet'r Ex. 14, 21; Resp't Ex. 14, 21.

56. The May 14th ARD committee prepared a new speech therapy IEP covering the end of the 2003-04 school year and the full 2004-05 school year. Valencia's present level of performance was assessed as having adequate speech fluency and voice quality and being able to follow one-step directions. The goals of the speech IEP were to increase Valencia's receptive and expressive language

skills, develop vocabulary, comprehend and correctly use action verbs and promote speech intelligibility. The IEP had five benchmarks: (1) categorize objects or pictures by their attributes; (2) identify verbs in the same category; (3) list two or more actions that someone or something can do; (4) point to the picture showing the intended meaning of a spoken figurative expression; and (5) produce speech sounds that are targeted. The committee specified that the speech therapist would continue to work with Valencia for the same two (2) hours per week. Pet'r Ex. 21; Resp't Ex. 21.

57. The May 14th ARD committee meeting extended the language and listening skills IEP from the January 26, 2004 ARD committee meeting and continued one (1) hour of services by the itinerant teacher for the auditory-impaired. Pet'r Ex. 21; Resp't Ex. 21.

58. The May 14th ARD committee meeting extended the content mastery IEP from the January 26, 2004 ARD committee meeting for the same one (1) hour per week. Pet'r Ex. 21; Resp't Ex. 21.

59. During the May 14th ARD committee meeting, there were conflicting accounts of Valencia's progress. The itinerant teacher for the auditory-impaired reported that Valencia was doing well on the Earobics program. Valencia's first grade teacher continued to express her same concerns

about Valencia's comprehension skills. Tr. at v. 2, pp. 485-86, 510; Tr. at v. 3, pp. 645, 660, 664-65, 667, 689; Pet'r Ex. 21, 32; Resp't Ex. 21, 32.

60. The May 14th ARD committee completed an auditory impairment supplement. The committee continued the indication that Valencia's mode of communication was oral/auditory. Pet'r Ex. 21; Resp't Ex. 21.

61. The May 14th ARD committee indicated that Valencia would not be off grade level except for content mastery, speech therapy and language and listening skills. She was to receive the same modifications as previously prescribed of speech, amplification, visual cues, teacher facing student, preferential class seating and questioning to check understanding. Pet'r Ex. 21; Resp't Ex. 21.

62. During the May 14th ARD meeting, Valencia's parent expressed disagreement and provided notice that Valencia would be withdrawn from HISD and placed in a private institution. Tr. at v. 2, pp. 487-88; Pet'r Ex. 21; Resp't Ex. 21.

63. A teacher certified in the education of auditory-impaired students was not physically present at the ARD committee meeting but participated by telephone. Pet'r Ex. 21; Resp't Ex. 21.

64. A recess ARD committee meeting was held for Valencia on May 21, 2004. Valencia's

parent expressed her dissatisfaction with Valencia's program and the district asserted the appropriateness of the program. Pet'r Ex. 22; Resp't Ex. 22.

65. The school special education chair did not check with Valencia's classroom teacher to monitor progress. Tr. at v. 3, p. 660.

66. HISD never conducted an assessment for auditory-processing disorder. Tr. at v. 1, p. 210-11, 213.

67. In May, 2004, Valencia's parents withdrew her from HISD a week before the end of the 2003-04 school year. Tr. at v. 2, p. 489.

68. Valencia has intensive language development and auditory processing needs observed by her teachers and documented by evaluations. These needs stem from (1) a sensory hearing loss and (2) an auditory-processing disorder. Her hearing loss is mild to moderately severe. Her auditory-processing disorder is severe. As a result, she has deficits in receptive skills, expressive language skills and audiological processing that significantly affect her understanding, comprehension and intelligibility. Tr. at v. 1, pp. 33-37, 60, 95, 108, 168, 187, 247; Tr. at v. 2, pp. 316, 323-24, 364, 385-86, 535; Tr. at v. 3, p. 761; Pet'r Ex. 7, 13, 40; Resp't Ex. 7, 13.

69. In Valencia's case, the lack of development of her auditory system is not ameliorated by

the correction of her hearing loss through amplification; she still has needs flowing from her auditory-processing disorder even after receiving hearing aids. Tr. at v. 1, pp. 31, 90, 171; Tr. at v. 2, pp. 385- 86; Tr. at v. 3, p. 783.

70. An expert – an experienced and independent audiologist and speech pathologist – conducted an appropriate advanced audiological evaluation of Valencia in October, 2004. Among other things, the evaluation identified Valencia's strengths and weaknesses. Valencia's weaknesses are in visual memory, instructional comprehension, phonological processing and auditory reception and processing. Tr. at v. 1, pp. 32-37; Tr. at v. 2, pp. 393-94; Pet'r Ex. 40.

71. To address her needs and weaknesses, Valencia requires several interventions such as auditory training, memory training, phonemic awareness training, noise desensitization, sequencing ability training, gap-detection training, onset time training, visual instruction and an FM loop system. She also requires a small classroom with seating near the teacher and minimal ambient noise. Further, she should wear her hearing aids at all times while at school. Such interventions are necessary for academic and educational benefit. Tr. at v. 1, pp. 39-46, 48, 52-53, 92, 94.

72. HISD did not develop IEPs for Valencia that were individualized to include all appropriate and necessary interventions for her auditory-processing disorder. Her IEPs lacked noise desensitization training to enable her to selectively attend and separate out voices from background noise; gap-detection training to enable her to perceive and pick up the gaps between phonemes, words and sentences; and sequencing training to enable her to sequence sounds in the order they are heard. Tr. at v. 1, pp. 58-61.

73. HISD did provide articulation therapy and language therapy to Valencia but without any change. Valencia's speech therapist could not provide more than two hours per week of service because of her limited schedule. The array of content mastery, an aide, an itinerant teacher for auditory-impaired, an FM loop system and Earobics program were provided but did not result in meaningful progress in the area of auditory-processing needs. Tr. at v. 1, pp. 186-87, 215-18, 259.

74. The Earobics program is comparable with the Fast ForWord program in meeting Valencia's needs in terms of phonemic awareness. Tr. at v. 3, pp. 685-86, 709.

75. The speech therapist who treated Valencia since her pre-K class stated that Valencia could not understand in class and had a hard time learning. The speech therapist

acknowledged that Valencia's standard scores on objective measures had remained flat over time. Valencia did not attain comprehension of the first grade curriculum. Tr. at v. 1, p. 215, 218, 253, 264; Tr. at v. .

76. Valencia continued to have language development needs while at HISD. Valencia's first grade teacher could not understand her and communicate with her. Valencia made no meaningful progress in articulation. The speech therapist for Valencia confirmed that her speech was unintelligible. Tr. at v. 1, pp. 215-16, 252; Tr. at v. 3, p. 627.

77. The Stanford Achievement Test, Ninth Edition (SAT-9) was administered to Valencia in Kindergarten prior to her receiving hearing aids. The Stanford Achievement Test, Tenth Edition (SAT-10) was administered to Valencia in the first grade after she received hearing aids. The improvement in her listening score is more attributable to the hearing aids provided by her parents than programming by HISD.

78. In February, 2003, on the Oral and Written Language Scales, Valencia had a standard score of 62 in oral expression and a standard score of 52 in listening comprehension. In November, 2003, on the Woodcock Language Proficiency Battery--Revised, Valencia had a standard score of 55 in oral expression and a standard score of 47 in listening

comprehension. Tr. at v. 3, pp. 723-24; Pet'r Ex. 7, 12; Resp't Ex. 7, 12.

79. In November, 2003, on the Woodcock Language Proficiency Battery--Revised, Valencia had a standard score of 82 in picture vocabulary. In April, 2004, on the Peabody Picture Vocabulary Test, Valencia had a standard score of 70 in picture vocabulary. Pet'r Ex. 10, 14; Resp't Ex. 10, 14.

80. In November, 2003, on the Woodcock Language Proficiency Battery–Revised, Valencia's score in listening comprehension indicated that while an average student performed listening comprehension tasks with 90 percent success, she performed listening comprehension tasks with seven (7) percent success. The district evaluator observed that Valencia will find the oral language demands of grade-level tasks very difficult to extremely difficult. Pet'r Ex. 10; Resp't Ex. 10.

81. Standard scores from testing in speech and language indicate that Valencia does not have the capacity to remain in a mainstream environment and achieve without appropriate interventions to address her auditory-processing disorder. Tr. at v. 1, pp. 217-18; Pet'r Ex. 14; Resp't Ex. 14.

82. The Parish School is located in Houston, TX and is a private school for children with different language-learning disabilities. It

serves children from preschool through fourth grade. It includes the Carruth Center that provides language services to the student body. Tr. at v. 2, pp. 370, 379-80, 400, 402; Pet'r Ex. 41.

83. Valencia was enrolled and began at the Parish School in September, 2004. Tr. at 2, p. 370; Tr. at v. 3, p. 572; Pet'r Ex. 41.

84. Valencia is served in a small classroom of 10 with a teacher and an assistant teacher. Valencia's class is a kinderg arten/first-grade multi-age grouping with children ranging from five to seven years old. Tr. at v. 2, pp. 375, 378, 388.

85. Valencia's placement in a kindergarten/first-grade class is appropriate for her level of understanding and abilities. Tr. at v. 1, pp. 85, 95, 168, 170; Tr. at v. 3, p. 799; Pet'r Ex. 41.

86. Valencia receives academic instruction along with 10 hours of group speech/language therapy per week. Tr. at v. 2, pp. 375, 391.

87. Valencia has ready access to speech pathologists that provide therapy addressing her receptive and expressive language skills. Tr. at v. 1, p. 62.

88. Valencia receives phonemic awareness training, auditory memory training and gap-detection training through the Fast

ForWord program. Tr. at v. 1, p. 65; Tr. at v. 2, p. 396; Tr. at v. 3, p. 685.

89. Valencia's classmates have different strengths and weaknesses. She is exposed to peers with expressive language ability that can serve as a role model for her development. Tr. at v. 1, pp. 84-85; Tr. at v. 2, pp. 388-89.

90. The Parish School has ensured that Valencia continues to wear her hearing aids including while on recess to benefit from the opportunity for language use. Tr. at v. 2, pp. 398-99.

91. The Parish School has ensured that Valencia has access to a functioning amplification system supervised by an audiologist. Tr. at v. 2, p. 382, 395, 398.

92. The Parish School has ensured that Valencia is not exposed to ambient noise whenever possible that is promoting noise desensitization. Tr. at v. 2, pp. 382, 397.

93. Her Parish School individualized plan for Valencia includes sequencing exercises that address her auditory processing needs. Pet'r Ex. 41.

94. The Parish School program is providing educational benefit to Valencia. The Parish School has used the advanced audiological evaluation to refine its array of services to Valencia to ensure educational benefit. Tr. at v. 2, p. 395; Pet'r Ex. 41.

95. Valencia's parents paid the Parish School a registration fee of $2,781. Tr. at v. 2, pp. 402-03; Tr. at v. 3, p. 573. Pet'r Ex. 41.

96. Valencia's parents pay the Parish School on a ten-month tuition payment plan for the 2004-05 school year; each monthly payment is $1,700. Tr. at v. 2, pp. 402-03; Tr. at v. 3, pp. 573-74; Pet'r Ex. 41.

Discussion

Notice of Admission, Review and Dismissal Committee Meeting

The Petitioner complains that Valencia's parents were not provided notice of ARD committee meetings. Under IDEA, parental participation in the special education process is vital to protect the student's rights and ensure the development of appropriate placements and programming. Parents must receive timely notice of ARD committee meetings. 34 C.F.R. § 300.345.

Here, the Petitioner does not satisfy her burden of proof that Mr. and Mrs. Juan P. were not notified of the ARD committee meetings pertaining to Valencia's first-grade year. At least one parent was present at all the ARD committee meetings. Thus, the parents had constructive notice even if there might have been complications in delivering written notice.

I conclude that the Respondent prevails on this claim.

Disclosure of Personally Identifiable Information

The Petitioner asserts that the chair of the special education department of Valencia's school caused the improper release of personal information about Valencia in the school's front office. In November, 2003, the special education chair and Valencia's mother had an encounter and somewhat loud argument in the school's front office. The Petitioner blames the department chair for putting private information being discussed at risk of being overheard by staff and parent volunteers present in the office area.

Under IDEA, school districts have a responsibility to safeguard the confidentially of personally identifiable information that it collects on children with disabilities. 34 C.F.R. § 300.572. Regarding this incident, the Petitioner offers more speculation than proof that anyone around the school office gained unauthorized access to protected information about Valencia.

I conclude that the Respondent prevails on this claim.

Identification of Auditory Impairment

One of the Petitioner's allegations is that HISD did not timely identify Valencia with an auditory impairment. Under IDEA, schools must identify, evaluate and provide FAPE to all children with disabilities in accordance with prescribed timelines. 34 C.F.R. §§ 300.125, 300.300.

To begin my analysis of this issue, I note that there is a one-year statute of limitations in due process hearings in Texas.[1] The limitations period is important given that HISD identified Valencia as a child with an auditory impairment at the ARD committee meeting of May 8, 2003. If the Petitioner had a complaint about the auditory impairment designation, she should have raised this issue by May 8, 2004. The Petitioner's request for hearing was received by the TEA on August 20, 2004. The Petitioner's challenge surrounding the auditory impairment identification is not timely as it is outside the limitations period.

I conclude that the Respondent prevails on this claim.

Individualized Education Program

The Petitioner contends that the IEPs for Valencia are not reasonably calculated to provide educational benefit to Valencia. I will address this issue as part of my analysis of the FAPE claim below.

Related Services, Supplementary Aids and Assistive Technology

The Petitioner's challenge with regard to related services, supplementary aids and assistive technology is focused on the FM loop system providing additional amplification for Valencia. Under IDEA, HISD has a duty to not just provide special education but also

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[1] 19 Tex. Admin. Code § 89.1151(c).

related services, supplementary aids and services and assistive technology. 34 C.F.R. §§ 300.300, 300.308.

Here, a problem occurred with the FM loop system in Fall, 2003. The loop was damaged or became inoperable. Valencia had to rely on a backup headphone system for about two months. The backup system was not always used properly. While there might have been a risk to Valencia, the Petitioner did not offer any evidence that Valencia did indeed suffer some tangible negative consequence from any misuse of the backup system.

Further, under Fifth Circuit caselaw – *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000) – the Petitioner must demonstrate that the Respondent failed to implement substantial or significant provisions of the IEP. *Id.* at 349. I find that the FM loop system is one piece of an array of IEP services and did not constitute a substantial or significant part of the IEP.

I conclude that the Respondent prevails on this claim.

Mode of Communication

The Petitioner states that she was denied the opportunity to select her mode of communication as a child with an auditory impairment. Under state law, students who are deaf or hard of hearing are entitled to choose their language mode. Tex. Educ. Code §§ 29.302-303.

I find that Valencia's ARD committees addressed her mode of communication in the auditory

impairment supplement to the ARD documentation. This supplement was filled out several times. I am not persuaded that the Petitioner had no knowledge of this selection; she has failed to support her contention that this form was somehow prepared without her knowledge.

I conclude that the Respondent prevails on this claim.

Staff Training

This charge is that the staff working with Valencia was not properly trained. Under IDEA, states must have personnel standards for those persons serving disabled students. 34 C.F.R. § 300.136.

The main concern expressed by the Petitioner about inadequate staff training centers on the FM loop system. The Petitioner did prove that the school nurse should not have been the primary trainer on the FM system. I find, however, that even though an audiologist should have assumed the role of trainer, the Petitioner did not establish that any subpar instructions from the nurse resulted in the system breaking or harm coming to Valencia. To prevail on this claim, the Petitioner must offer not just a procedural defect (here the wrong person tapped to give training) but also some educational detriment suffered by Valencia per *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003).

I conclude that the Respondent prevails on this claim.

Placement

The Petitioner contends that HISD did not consider an appropriate placement for her. I will address this issue as part of my analysis of the FAPE claim below.

Free Appropriate Public Education

The overarching issue in this case is the Petitioner's FAPE claim. My analysis of the IEP and placement claims will resolve the FAPE question. In order for the Petitioner to prevail, she must demonstrate by a preponderance of the evidence that her IEPs were not in compliance with IDEA procedures and were not reasonably calculated to enable him to receive educational benefits. If the Petitioner satisfies her burden through this two-part test, then HISD would be denying Valencia FAPE in accordance with *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

With regard to the second prong of the *Rowley* inquiry, the Fifth Circuit's criteria to evaluate whether a program is reasonably calculated to confer educational benefits are outlined in *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).[2] There are four factors in the *Cy-Fair* opinion.

Individualized Program

The first *Cy-Fair* factor is whether the program is individualized on the basis of the student's assessment

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[2] Hereafter referred to as "*Cy-Fair*."

and performance. Here, I must find that Valencia's IEPs have not been individualized. They do not recognize her auditory-processing disorder and needs. While the district was aware of the prospect of an auditory-processing disorder early during Valencia's time within HISD, and even with an ARD committee flagging the need for a processing assesment, the district refused to evaluate for a processing disorder.[3] Without appreciating her needs, an individualized response cannot be developed.

LRE

The second *Cy-Fair* factor is whether the program is administered in the least restrictive environment (LRE). In Texas, the prevailing case on the LRE standard is *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). The first part of the *Daniel R.R.* test asks whether full-time education in the regular classroom, with the use of supplementary aids and services, can be achieved satisfactorily. I find that Valencia cannot be educated in the regular classroom as demonstrated by her stagnant standard scores in language and auditory processing. Further, episodes such as the one in content mastery with the chair of the special education department at her elementary school reveal how intense her needs are and either how ill prepared or incapable staff is in dealing with her around the regular environment.[4] In addition, because of practices such as having Valencia remove her hearing aids while on recess, she is being isolated on

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[3] See, for example, Finding of Fact No. 10 and 66.

[4] See, for example, Finding of Fact No. 33.

an auditory basis; she may be physically integrated, but she is not integrated on a basic communication level.

Key Stakeholders

The third *Cy-Fair* factor is whether the key stakeholders provide the program services in a coordinated and collaborative manner. On this point, I cannot credit the district because of several instances of poor communication and lack of collaboration. One example is the FM loop system; Valencia was without her FM loop system longer than necessary because of miscommunication about getting it either repaired or replaced. Further, testimony at hearing clarified that the special education department chair at Valencia's school was not monitoring progress as was initially represented.

Positive Benefits

The fourth *Cy-Fair* factor is whether Valencia's proposed plan and placement are reasonably calculated to generate positive academic and nonacademic benefits. After considering the evidence, especially the testimony of the experienced educator with the most contact with Valencia – her first-grade teacher, I find that the Petitioner has demonstrated that maintaining Valencia at Wainwright Elementary would be a detriment to her.[5]

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[5] See *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir. 1991) regarding the weight to be given to testimony from those with daily and continuing observation within the classroom environment.

In sum, I see all the Cy-Fair factors as weighing toward a finding that the plan and placement put forward by the district are not reasonably calculated to confer all the academic and nonacademic benefits required by Valencia. I conclude that the Petitioner prevails on this issue.

Relief

As a threshold matter, there is a question of whether the Petitioner is eligible for reimbursement. Under 34 C.F.R. § 300.403(d)(1), reimbursement may be reduced or denied if the parents did not take certain steps. Valencia's parents did comply with this requirement.

The next step in the analysis is the addressing the question of whether Valencia's parental placement is appropriate. In order to obtain reimbursement for Valencia's placement at the Parish School, the Petitioner must demonstrate not only that the district's placement was not appropriate, but also that the parental alternative selected is appropriate. 34 C.F.R. § 300.403(c).

I conclude that the Parish School is appropriate for Valencia.[6] I award reimbursement in accordance with the documented expenses.

Conclusions of Law

After due consideration of the foregoing findings of fact, I make the following conclusions of law:

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[6] See, for example, Finding of Facts No. 82-94.

1. The Petitioner, Valencia P., is eligible for special education and related services as a child with a disability under IDEA.

2. The Respondent, Houston Independent School District, did not deny the Petitioner's parents notice of ARD committee meetings. 34 C.F.R. § 300.345.

3. The Respondent, Houston Independent School District, did not breach the confidentiality of the Petitioner. 34 C.F.R. § 300.572.

4. The Respondent, Houston Independent School District, was not untimely in the identification of the Petitioner as a child with an auditory impairment. 34 C.F.R. §§ 300.125, 300.300

5. The Respondent, Houston Independent School District, did not fail to implement a FM loop system for the Petitioner. *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000).

6. The Respondent, Houston Independent School District, did not deny the Petitioner her choice of mode of communication. Tex. Educ. Code §§ 29.302-303.

7. The Respondent, Houston Independent School District, did not fail to provide trained staff for the Petitioner. 34 C.F.R. § 300.136.

8. The Respondent, Houston Independent School District, proposed a placement that was not reasonably calculated to provide FAPE to the Petitioner, Valencia P., under *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

9. The Respondent, Houston Independent School District, proposed a placement that was not the LRE for the Petitioner, Valencia P., under *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

10. The Petitioner, Valencia P., is being provided with an appropriate private education selected by her parents. 34 C.F.R. § 300.403.

11. The Petitioner, Valencia P., is entitled to reimbursement of her parentally selected private placement under *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985) and *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245 (5th Cir. 1997).

Order

Based upon the foregoing findings of fact and conclusions of law,

IT IS HEREBY ORDERED THAT:

1. The compensation sought by the Petitioner for the cost of private placement of Valencia P.

shall be and is **GRANTED IN PART**. To wit, the Respondent shall compensate the Petitioner for documented registration, tuition, fees and charges incurred for enrolling and maintaining Valencia P. at the Parish School, Houston, TX, during the 2004-05 school year. Authorized expenses include only those for the Parish School and the associated Carruth Center, Inc. The Respondent may either reimburse the Petitioner or pay the Parish School, Houston, TX, directly upon receipt of invoices for such registration, tuition, fees and charges. The term of reimbursement or payment shall be 30 days. The parties may agree otherwise to the sum and manner of payments.

2. All other relief sought by the Petitioner and not specifically granted shall be and is **DENIED**.

3. The Respondent shall timely implement this Final Decision within 10 school days in accordance with 19 Tex. Admin. Code § 89.1185(q) and 34 C.F.R. § 300.514. The Respondent must provide the following to the Division of Special Education Programs and Complaints at the TEA and copied to the Petitioner within 15 school days from the date of this Final Decision: (1) documentation demonstrating that the Final Decision has been implemented or (2) if the timeline set by the Hearing Officer for implementing certain aspects of the Final Decision is longer than 10 school days, the Respondent's plan for implementing the Final Decision within the prescribed timeline and a signed assurance from

the superintendent that the Final Decision will be implemented.

SIGNED this _ 10th _ day of February, 2005.

_/s/ Steven R Aleman_____
Steven R. Aleman
Special Education Hearing Officer

TEA DOCKET No. 405-SE-0804

VALENCIA P.,	)
b/n/f MR. and MRS. JUAN P.	)
Petitioner	)
	)
v.	)
	)
HOUSTON INDEPENDENT	)
SCHOOL DISTRICT	)
Respondent.	)
	)

BEFORE A SPECIAL EDUCATION HEARING OFFICER FOR THE STATE OF TEXAS

SYNOPSIS

ISSUE 1: Whether Houston ISD failed to provide FAPE to Valencia P.?

CITE: 34 C.F.R. § 300.300

HELD: For the Petitioner. District did not reasonable confer academic and nonacademic benefits to student.

ISSUE 2: Whether Houston ISD failed to provide notice of an ARD committee meeting to the parents of Valencia P.?

CITE: 34 C.F.R. § 300.345

HELD: For the Respondent. The Petitioner failed to demonstrate that the student's parents were denied actual or constructive notice of ARD committee meetings.

ISSUE 3: Whether Houston ISD improperly disclosed personally identifiable information about Valencia P. without parental consent?

CITE: 34 C.F.R. § 300.572

HELD: For the Respondent. The Petitioner failed to show that any personally identifiable information about the student was disclosed.

ISSUE 4 : Whether Houston ISD failed to timely identify an auditory impairment of Valencia P.?

CITE: 34 C.F.R. §§ 300.125, 300.300

HELD: For the Respondent. The Petitioner's challenge is barred by the statute of limitations.

ISSUE 5: Whether Houston ISD failed to develop individualized education programs (IEPs) reasonably calculated to provide educational benefit to Valencia P.?

CITE: 34 C.F.R. § 300.300.

HELD: For the Petitioner. District's IEPs did not address auditory-processing disorder of Petitioner.

ISSUE 6: Whether Houston ISD failed to implement and/or deliver special education, related services, supplementary aids and services and/or assistive technology in the IEPs of Valencia P.?

CITE: 34 C.F.R. §§ 300.300, 300.308

HELD: For the Respondent. The Petitioner failed to show any actual negative consequence to the Petitioner from an alternative amplification system used while her primary application unit was being repaired and replaced.

ISSUE 7: Whether Houston ISD denied Valencia P. her choice of mode of communication?

CITE: Tex. Educ. Code §§ 29.302-303

HELD: For the Respondent. The Petitioner's ARD documentation indicated her communication mode.

ISSUE 8: Whether Houston ISD failed to provide properly trained staff to serve Valencia P.?

CITE: 34 C.F.R. § 300.136

HELD: For the Respondent. The Petitioner failed to prove that any training provided was a detriment to her.

ISSUE 9: Whether Houston ISD failed to consider an appropriate placement for Valencia P.?

CITE: 34 C.F.R. § 300.550

HELD: For the Petitioner. District's placement did not reasonable confer nonacademic benefits to student.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20817

[Filed October 7, 2009]

HOUSTON INDEPENDENT SCHOOL DISTRICT,	)
Plaintiff - Appellee Cross-Appellant	)
v.	)
VP by next friend, Juan and Sylvia P,	)
Defendant - Appellant Cross-Appellee	)

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 9/9/09, 5 Cir., _____, _____, F.3d _____)

Before BENAVIDES, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5 TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

REHG6A